Submitted with 53 Nov 30

Judge Davy

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~310.~~ 90

THE TOWN OF VENICE, PLAINTIFF IN ERROR.

vs.

OPHER EDSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 28, 1873.

SUPREME COURT OF THE UNITED STATES.

No. 310.

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1 United States circuit court, the northern district of New York.

Pleas before the judges of the circuit court of the United States of America for the northern district of New York, at the city of Albany, at the October term of said court, held at said city, on the second Tuesday of October, A. D. 1870.

Present, the honorable Lewis B. Woodruff, judge.

CHARLES MASON, *Clerk.*

NORTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, at the October term of said circuit court, A. D. 1870, to wit, the 13th day of December, 1870, came Opher Edson, by his attorney, David Wright, and brought into said court his certain declaration against the Town of Venice.

2 At an adjourned term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the city of Utica on Friday, the 21st day of March, in the year of our Lord one thousand eight hundred and seventy-three.

Present, the honorable Lewis B. Woodruff, judge.

OPHER EDSON
vs.
THE TOWN OF VENICE.

By consent of the attorneys for the respective parties, ordered that the declaration herein be amended, so as to include account upon the second bond mentioned in the declaration, and for the recovery of the principal sums of $1,000.00 each named therein, with interest thereon from the first day of January, 1850, and the caption of the declaration to be amended so it shall stand at a day subsequent to January last. The pleadings herein to stand as pleas to said declaration.

3 Circuit court U. S., second circuit and N. D. of N. Y.

Of the term of October, 1872, to wit, of this 5th day of January, 1873, as yet of the said term of October, one thousand eight hundred and seventy-two.

NORTHERN DISTRICT OF NEW YORK, *ss:*

Opher Edson, plaintiff in this action, by David Wright, his attorney, complains of the Town of Venice, defendant in this action, by this his declaration, filed and served according to the form of the statute in such case made and provided, and not by writ of a plea, that said Town of Venice render to him, the said plaintiff, the sum of six thousand dollars, lawful money of the United States, which said town owes to and unjustly detains from him, the said plaintiff.

For that whereas the said Opher Edson is not a citizen of the State of New York, but is a citizen of the State of Vermont, in the said United States of America, and the said Town of Venice, the defendant, is one of the towns of the county of Cayuga, in said State of New York, and is a municipal corporation for certain purposes, and, amongst others, of suing and being sued upon contracts.

And for that whereas heretofore, to wit, on the 16th day of April, 1852, an act was duly passed by the legislature of the State of New

York, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie or Cayuga and Susquehanna Railroad," whereby it was, amongst other things, enacted that it should be lawful for the supervisor of any town in the county of Cayuga, and the assessors of such town, who were appointed by said act as commissioners, to act in conjunction with the supervisor in effecting and executing the purposes of said act, to borrow, on the faith and credit of such town, such a sum of money as they might deem necessary, not to exceed twenty-five thousand dollars, for a term of time not exceeding twenty years, with such rate of interest as might be agreed upon, not exceeding seven per cent. per annum, and to execute therefor, under their official signatures, a bond or bonds on which the interest should be made payable annually or semi-annually, during the term for which said money should be borrowed, and the principal and interest of which loan should be made payable in such sums and at such times and place as should be agreed upon and expressed in the bonds, which should be duly executed under the authority of said act. And wherein and whereby it was further enacted that the said assessors who were so as aforesaid appointed to act as such commissioners should hold the said office of commissioners until the then next annual town meeting of their town, when it should be the duty of the electors of said town to elect by ballot, in the same manner as town officers were then elected, two commissioners, to be called "railroad commissioners," to act in conjunction with the supervisor in carrying into effect the provisions of said act.

And wherein and whereby it was further provided that the action of a majority of such supervisor and commissioners should at all times be sufficient for carrying into effect the provisions of said act. And wherein and whereby it was further provided that the said supervisor and commissioners should have no power to borrow said moneys, nor to issue bonds for the payment thereof, until a railroad company should have been duly organized, according to the requirements of the general railroad law, for the purpose of constructing a railroad passing through the city of Auburn, and connecting Lake Ontario with the Susquehannah and Cayuga Railroad, or the New York and Erie Railroad, and the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll of said town made next previous to the time such money might be borrowed, should have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor and commissioners, or of any two of them, attached to said assent, to the effect that the persons whose written assents were thereto attached and filed as aforesaid comprised two-thirds of all the resident tax-payers of said town on its assessment-roll next previous thereto.

And for that whereas a railroad company, to wit, the Lake Ontario, Auburn and New York Railroad Company, was afterwards duly organized, to wit, on the 23d day of August, 1852, according to the provisions of the general railroad law of the State of New York, for the purpose of constructing a railroad passing through the said city of Auburn, and connecting Lake Ontario with the Susquehannah and Cayuga Railroad.

And for that whereas the written assent of two-thirds of the resident persons taxed in said town, as appeared on the assessment-roll thereof next previous to the time of the borrowing of the money and the issuing of the bonds for the payment thereof by the supervisor and commissioners of said town, as is hereinafter mentioned, was obtained by said

supervisor and commissioners, and the same, together with the affidavit of said supervisor and commissioners of said town, thereto attached, to the effect that the persons whose written assents were thereto attached comprised two-thirds of all the resident tax-payers of said town of Venice on its assessment-roll next previous to the making of said affidavit, were duly filed by said supervisor and commissioners in the clerk's office of said county of Cayuga, before the borrowing of any money or the execution of any bonds for the payment thereof by said supervisor and commissioners, to wit, on the third day of November, one thousand eight hundred and fifty-two. And thereupon, afterwards, to wit, on the second day of March, one thousand eight hundred and fifty-three, Calvin King, who was then the supervisor of said town of Venice, and Jonas Wood and Isaac Smith, who were then the railroad commissioners of said town, duly elected by the electors of said town at the town meeting next preceding the said second day of March, one thousand eight hundred and fifty-three, in the same manner as other town officers of said town were then required by law to be elected, under their several official signatures, duly executed a certain writing obligatory or bond of said Town of Venice, bearing date the said second day of March, one thousand eight hundred and fifty-three, and numbered 10 in the series of bonds executed under and in virtue of the provisions of said act, whereby the said Town of Venice, in pursuance of said act of the legislature of the State of New York, acknowledged itself to owe and promised to pay to the bearer of said bond No. 10 the sum of one thousand dollars, with interest thereon at the rate of seven per cent. per annum, the same payable semi-annually, on the first day of January and the first day of July in each year, on surrender of the coupons to said bond attached, at the Bank of the State of New York, in the city of New York; the principal to be paid at the same place at the expiration of twenty years from the date thereof.

And whereas the said above-named supervisor and railroad commissioners, at the same time of the execution of said bond, also executed under their official signatures, coupons for each and every installment of semi-annual interest which would become due and payable upon said bond until the principal thereof should become due and payable,
4 which said coupons were annexed or attached to said bond, and were each made payable to the bearer thereof at the said Bank of the State of New York in the said city of New York.

And whereas afterwards, and before said bond No. 10 had been negotiated or delivered by said town to any person, to wit, on the 16th day of May, one thousand eight hundred and fifty-three, the then clerk of said county of Cayuga, at the request of the said town, made and endorsed upon said bond No. 10 his certificate in writing, duly signed by him in his official character as such clerk, whereby he, the said clerk, under his official signature, certified that a paper, purporting to be the written assent of two-thirds of the resident tax-payers of said town, with the affidavit required by section one of the act above referred to, had been filed in said clerk's office.

And whereas the said supervisor and railroad commissioners, and acting as such, afterwards and after the execution of said bond No. 10, as aforesaid, and after the organization of said railroad company as aforesaid, and after the written assent of two-thirds of the resident persons taxed in said town, as appearing on the last assessment-roll, had been obtained, and, together with the affidavit of the said supervisor and railroad commissioners thereto attached, as required by said act, had been filed, as aforesaid, to wit, on the said second day of March, one thousand eight

hundred and fifty-three, at the said town of Venice, in the said county of Cayuga, borrowed on the faith and credit of said town, of some person whose name is unknown to this plaintiff, the sum of one thousand dollars, for the purpose, and in accordance with the provisions, and in virtue of said act of the legislature of the State of New York; and to secure the payment thereof, with interest thereon at the rate of seven per cent., payable semi-annually, delivered the said bond No. 10, with the coupons for said interest as above mentioned thereto attached, and the said official certificate of said clerk of said county of Cayuga thereon endorsed, to the said person of whom said money was so as aforesaid borrowed, who thereby, then and there, became and was the owner, holder, and bearer thereof, and entitled to demand, collect, and have all the principal and interest-monies which should thereafter become due and payable thereon, and to sell and transfer the same by delivery.

And whereas the said Town of Venice paid all installments of interest upon said bond, from time to time, as the same became due and payable, up to and including the installment thereof which became due and payable on the first day of July, one thousand eight hundred and fifty-five, and the coupons were, from time to time, as the same were paid, detached from said bond and cancelled.

And for that whereas, afterwards, to wit, on the first day of January, one thousand eight hundred and fifty-five, at Chester, in said State of Vermont, he, the said plaintiff, for a valuable consideration, then paid by him therefor, purchased, and then and there became, and has ever since continued to be, and now is, the owner, holder, and bearer of said bond No. 10, together with the principal and interest remaining unpaid thereon, and said bond, together with the coupons for the unpaid interest due and to grow due thereon and thereto attached, were thereupon then and there delivered to him, the said plaintiff, and the same have ever since continued and remained, and still remain, in his possession as such owner, holder, and bearer thereof, and he, the said plaintiff, thereby became and was, and still is, entitled to demand, have, and receive all the monies then due and remaining unpaid thereon, and also all monies which should thereafter become due and payable thereon, or by virtue thereof, when and as the same should thereafter become due and payable according to the terms and conditions thereof.

And the said plaintiff avers that there is now actually due and payable from the said Town of Venice to him, the said plaintiff, the sum of three thousand dollars, being the principal and interest monies which have accrued thereon from the day of the date thereof, no part thereof having ever been paid by the said The Town of Venice to any owner, holder, or bearer of said bond.

And the said plaintiff further avers that the said The Town of Venice had not at the time the said principal and the several installments of interest upon said bond No. 10, which so as aforesaid remained unpaid, became due and payable, nor has not had, at any time since, at the said the Bank of the State of New York or elsewhere any money or means whereby the said installments of interest, or any or either of them, or any part thereof, or of any or either of them could or would have been paid had a demand thereof been made when and as the same became due and payable, as provided in and by the terms of said bond and said coupons; and although often requested so to do, the said Town of Venice has hitherto wholly refused and still does refuse to pay the said principal and the several installments so as aforesaid remaining due and payable and unpaid upon said bond No. 10, or any or either of them or any part thereof or of any or either of them.

And the plaintiff brings into court here the said bond No. 10 and coupons attached to said bond for the said installments for interest monies which have so as aforesaid become due and payable upon said bond, that the same may be detached from said bond and cancelled, whereby and by reason of the said principal and the said several installments of interest monies herein in this count above mentioned being and remaining due and wholly unpaid, an action hath accrued to the said plaintiff to demand and have of and from the said Town of Venice the said sum of three thousand dollars, being the aggregate of the said principal and the said several installments of interest so as aforesaid remaining due and unpaid upon said bond No. 10, together with interest upon said several installments from the time the same severally became due and payable, as in this count above mentioned, parcel of the said sum first above demanded.

And the said plaintff brings here into court the said bond or writing obligatory No. 10, and also the said coupons which are thereto attached, each severally duly executed by said supervisor and railroad commissioners under their official signatures, and also with the said certificate of said clerk of said county of Cayuga on said bond endorsed, which gives sufficient evidence to the said court here of the debt aforesaid, in form aforesaid, the date whereof is the certain day and year in that behalf hereinbefore stated.

5 And also for that whereas, heretofore, to wit, on the 16th day of April, 1852, an act was duly passed by the legislature of the State of New York, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie or Cayuga and Susquehanna Railroad," whereby it was, amongst other things, enacted that it should be lawful for the supervisor of any town in the county of Cayuga, and the assessors of such town, who were appointed by said act as commissioners, to act in conjunction with the supervisor in effecting and executing the purposes of said act, to borrow, on the faith and credit of such town, such a sum of money as they might deem necessary, not to exceed twenty-five thousand dollars, for a term of time not exceeding twenty years, with such rate of interest as might be agreed upon, not exceeding seven per cent. per annum, and to execute therefor, under their official signatures, a bond or bonds on which the interest should be made payable annually or semi-annually during the term for which said money should be borrowed, and the principal and interest of which loan should be made payable in such sums, and at such times and place as should be agreed upon and expressed in the bonds, which should be duly executed under the authority of said act. And wherein and whereby it was further enacted that the said assessors who were so as aforesaid appointed to act as such commissioners, should hold the said office of commissioners until the then next annual town meeting of their town, when it should be the duty of the electors of said town to elect by ballot, in the same manner as town officers were then elected, two commissioners to be called "railroad commissioners," to act in conjunction with the supervisor in carrying into effect the provisions of said act.

And wherein and whereby it was further provided that the action of a majority of such supervisor and commissioners should at all times be sufficient for carrying into effect the provisions of said act. And wherein and whereby it was further provided that the said supervisor and commissioners should have no power to borrow said moneys, nor to issue bonds for the payment thereof, until a railroad company should

have been duly organized, according to the requirements of the general railroad law, for the purpose of constructing a railroad passing through the city of Auburn, and connecting Lake Ontario with the Susquehannah and Cayuga Railroad, or the New York and Erie Railroad, and the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll of said town made next previous to the time such money might be borrowed, should have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor and commissioners, or of any two of them, attached to said assent, to the effect that the persons whose written assents were thereto attached and filed as aforesaid, comprised two-thirds of all the resident tax-payers of said town on its assessment-roll next previous thereto.

And for that whereas a railroad company, to wit, the Lake Ontario, Auburn and New York Railroad Company, was afterwards duly organized, to wit, on the 23d day of August, 1852, according to the provisions of the general railroad law of the State of New York, for the purpose of constructing a railroad passing through the said city of Auburn, and connecting Lake Ontario with the Susquehannah and Cayuga Railroad.

And for that whereas the written assent of two-thirds of the resident persons taxed in said town, as appeared on the assessment-roll thereof next previous to the time of the borrowing of the money and the issuing of the bonds for the payment thereof by the supervisor and commissioners of said town, as is hereinafter mentioned, was obtained by said supervisor and commissioners, and the same, together with the affidavit of said supervisor and commissioners of said town, thereto attached, to the effect that the persons whose written assents were thereto attached, comprised two-thirds of all the resident tax-payers of said town of Venice on its assessment-roll next previous to the making of said affidavit, were duly filed by said supervisor and commissioners in the clerk's office of said county of Cayuga, before the borrowing of any money or the execution of any bonds for the payment thereof by said supervisor and commissioners, to wit, on the third day of November, one thousand eight hundred and fifty-two. And thereupon, afterwards, to wit, on the second day of March, one thousand eight hundred and fifty-three, Calvin King, who was then the supervisor of said town of Venice, and Jonas Wood and Isaac Smith, who were then the railroad commissioners of said town, duly elected by the electors of said town, at the town meeting next preceding the said second day of March, one thousand eight hundred and fifty-three, in the same manner as other town officers of said town were then required by law to be elected, under their several official signatures, duly executed a certain writing obligatory or bond of said Town of Venice, bearing date the said second day of March, one thousand eight hundred and fifty-three, and numbered 23 in the series of bonds executed under and in virtue of the provisions of said act, whereby the said Town of Venice, in pursuance of said act of the legislature of the State of New York, acknowledged itself to owe and promised to pay to the bearer of said bond No. 23 the sum of one thousand dollars, with interest thereon at the rate of seven per cent. per annum, the same payable semi-annually, on the first day of January and the first day of July in each year, on surrender of the coupons to said bond attached, at the Bank of the State of New York, in the city of New York; the principal to be paid at the same place at the expiration of twenty years from the date thereof.

And whereas the said above-named supervisor and railroad commissioners at the same time of the execution of said bond also executed, under their official signatures, coupons for each and every installment of semi-annual interest which would become due and payable upon said bond until the principal thereof should become due and payable, which said coupons were annexed or attached to said bond, and were each made payable to the bearer thereof, at the said Bank of the State of New York in the said city of New York.

And whereas, afterwards, and before said bond No. 23 had been negotiated or delivered by said town to any person, to wit, on the sixteenth day of May, one thousand eight hundred and fifty-three, the then clerk of said county of Cayuga, at the request of the said town, made and endorsed upon said bond No. 23, his certificate in writing, duly signed by him in his official character as such clerk, whereby he, the said clerk, under his official signature, certified that a paper purporting to be the written assent of two-thirds of the resident tax-payers of said town, with the affidavit required by section one of the act above referred to, had been filed in said clerk's office.

And whereas the said supervisor and railroad commissioners, and acting as such, afterwards, and after the execution of said bond No. 23, as aforesaid, and after the organization of said railroad company as aforesaid, and after the written assent of two-thirds of the resident persons taxed in said town, as appearing on the last assessment-roll, had been obtained, and, together with the affidavit of the said supervisor and railroad commissioners thereto attached, as required by said act, had been filed, as aforesaid, to wit, on the said second day of March, one thousand eight hundred and fifty-three, at the said town of Venice, in the said county of Cayuga, borrowed, on the faith and credit of said town, of some person whose name is unknown to this plaintiff, the sum of one thousand dollars, for the purpose, and in accordance with the provisions, and in virtue of said act of the legislature of the State of New York; and to secure the payment thereof, with interest thereon at the rate of seven per cent., payable semi-annually, delivered the said bond No. 23, with the coupons for said interest as above mentioned thereto attached, and the said official certificate of said clerk of said county of Cayuga thereon endorsed, to the said person of whom said money was so as aforesaid borrowed, who thereby, then and there, became and was the owner, holder, and bearer thereof, and entitled to demand, collect, and have all the principal and interest monies which should thereafter become due and payable thereon, and to sell and transfer the same by delivery.

And whereas the said Town of Venice paid all installments of interest upon said bond, from time to time, as the same became due and payable, up to and including the installment thereof which became due and payable on the first day of July, one thousand eight hundred and fifty-six, and the coupons were, from time to time, as the same were paid, detached from said bond and cancelled.

And for that whereas, afterwards, to wit, on the first day of January, one thousand eight hundred and fifty-six, at Chester, in the said State of Vermont, he, the said plaintiff, for a valuable consideration then paid by him therefor, purchased, and then and there became, and has ever since continued to be, and now is, the owner, holder, and bearer of said bond No. 23, together with the principal and interest remaining unpaid thereon, and said bond, together with the coupons for the unpaid interest due and to grow due thereon, and thereto attached, were thereupon then and there delivered to him, the said plaintiff, and the same have

ever since continued and remained, and still remain in his possession as such owner, holder, and bearer thereof, and he, the said plaintiff, thereby became and was, and still is entitled to demand, have and receive all the monies then due and remaining unpaid thereon, and also all monies which should thereafter become due and payable thereon, or by virtue thereof, when and as the same should thereafter become due and payable according to the terms and conditions thereof.

And the said plaintiff avers that there is now actually due and payable from the said Town of Venice to him, the said plaintiff, the sum of three thousand dollars, being the principal and interest monies which have accrued thereon from the said first day of July, one thousand eight hundred and fifty-six, no part thereof having ever been paid by the said The Town of Venice to any owner, holder, or bearer of said bond.

And the said plaintiff further avers that the said The Town of Venice had not, at the time the principal or the several installments of interest upon said bond No. 23, which so as aforesaid remained unpaid, became due and payable, nor has not had, at any time since, at the said the Bank of the State of New York, or elsewhere, any money or means whereby the said principal or the said installments of interest, or any or either of them, or any part thereof, or of any or either of them could or would have been paid had a demand thereof been made when and as the same became due and payable, as provided in and by the terms of said bond and said coupons; and although often requested so to do, the said Town of Venice has hitherto wholly refused and still does refuse to pay the said several installments so as aforesaid remaining due and payable and unpaid upon said bond No. , or any or either of them, or any part thereof, or of any or either of them.

And the said plaintiff brings into court here the said bond and the coupons attached to said bond for the said installments for interest-monies which have so as aforesaid become due and payable upon said bond, that the same may be detached from said bond and cancelled, whereby and by reason of the said several installments of interest-monies herein, in this count above mentioned, being and remaining due and wholly unpaid, an action hath accrued to the said plaintiff to demand and have of and from the said Town of Venice the said sum of three thousand dollars, being the aggregate of the said several installments of interest so as aforesaid remaining due and unpaid upon said bond No. 23, together with interest upon said several installments from the time the same severally became due and payable, as in this count above mentioned, parcel of the said sum first above demanded.

And the said plaintiff brings here into court the said bond or writing obligatory No. 23, and also the said coupons which are thereto attached, each severally duly executed by said supervisor and railroad commissioners under their official signatures, and also with the said certificate of said clerk of said county of Cayuga on said bond endorsed, which gives sufficient evidence to the said court here of the debt aforesaid, in form aforesaid, the date whereof is the certain day and year in that behalf hereinbefore stated.

Wherefore the said plaintiff demands judgment against said defendant for the said two several sums of one thousand dollars each, with interest thereon from the said first day of July, one thousand eight hundred and fifty-six, together with the costs & disbursements of this action.

D. WRIGHT,
Pltff.'s Atty.

7 *Oyer.*

The following is a copy of the bond refer'ed to in the first count of the declaration hereto annexed. And bond No. 23 (7) is a duplicate thereof except the number thereof.

STATE OF NEW YORK,
County of Cayuga :

Seven per cent. loan not exceeding $25,000.

Be it known that the Town of Venice, in the county of Cayuga and State of New York, in pursuance of an act of the legislature of the said State, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie or Cayuga and Susquehannah Railroad," passed April 16th, 1852, and for the purpose of aiding the construction of the Lake Ontario, Auburn and New York Railroad, owes and promises to pay to
or bearer, one thousand dollars, with interest at the rate of seven per cent., payable semi-annually, on the first days of January and July in each year, on surrender of the coupons hereto attached, at the Bank of the State of New York, in the city of New York, the principal to be reimbursable at the same place at the expiration of twenty years from the first day of January, 1853.

In testimony whereof the supervisor and commissioners of the town of Venice have, pursuant to the provisions of the act aforesaid and the written assent of two-thirds of the resident tax-payers of said town, obtained and filed in the office of the clerk of the county of Cayuga, hereunto subscribed their names this second day of March, A. D. 1853.

CALVIN KING, *Supervisor.*
JONAS WOOD,
ISAAC SMITH,
Commissioners.

CAYUGA COUNTY, CLERK'S OFFICE.

I, Edwin B. Marvin, clerk of the county of Cayuga, hereby certify that a paper purporting to be the written assent of two-thirds of the resident tax-payers of the town of Venice, with the affidavit required by sec. 1 of the act refer'ed to by its title in the foregoing bond, has been filed in this office.

Dated Auburn, May 16th, 1853.

E. B. MARVIN,
Clerk of Cayuga County.

(Indorsed:) C. C. U. S. N. D. of N. Y. Opher Edson vs. The Town of Venice. Amended declaration. D. Wright, plff.'s atty. Filed April 14, 1873.

8 Circuit court U. S., northern district of New York.

THE TOWN OF VENICE
ads.
OPHER EDSON.

And the said defendant, the Town of Venice, by Michael S. Myers, its attorney, comes & defends the wrong and injury, when, &c., and

says that the said defendant does not owe the said sums of money above demanded, or any part or portion thereof, in manner and form as the said plaintiff hath above thereof complained against the said defendant. And of this the said defendant puts itself upon the country, &c.

Second. And for a further plea in this behalf, as to the said several sums of money above demanded in the several counts of the said plaintiff's declaration mentioned, the said defendant, by leave of the court here for that purpose first had and obtained, according to the form of the statute in such case made and provided, says that as to
9 the portion of the said several sums of money alleged to have accrued upon said alleged writings obligatory, or bonds and coupons which become due and payable on or before the first day of January, eighteen hundred and sixty-five, the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendant, because the said defendant says that the same did not, nor did any part or portion thereof accrue within six years next before the commencement of this suit, and as to the remaining portion of the said several sums of money in the said several counts last above mentioned, the said defendant does not owe the same, or any or either of them, or any part or portion thereof, in manner and form as the said plaintiff hath above thereof complained against the said defendant. And this the said defendant is ready to verify. Wherefore the said defendant prays judgment if the said plaintiff ought to have or
10 maintain his said action thereof against this defendant, as in said several counts in said declaration mentioned.

Third. And for a further plea in this behalf, the said defendant, by leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against this the said defendant, because this the said defendant says, that the said several supposed causes of action in the said declaration mentioned did not nor did any or either of them accrue to the said plaintiff at any time within six years before the commencement of this suit in manner and form as the said plaintiff hath above thereof complained against this the said defendant. And this the said defendant is ready to verify. Wherefore the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against this the said defendant.

11 Fourth. And for a further plea in this behalf, the said defendant, by leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, and further defending the wrong and injury, when, &c., says that the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendant, because the said defendant says that the said several supposed writings obligatory or bonds and coupons in said plaintiff's declaration mentioned and referred to are not, nor are any or either of them, the deed of the said defendant. And of this the said defendant puts itself upon the country, &c.

Fifth. And for a further plea in this behalf, the said defendant, by leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendant, because the said defend-
12 ant says that the said Calvin King in said declaration mentioned was not the supervisor, nor Jonas Wood & Isaac Smith in said

declaration mentioned were not, nor were either of them assessors of said town of Venice, at the time when said act entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontrio to the New York and Erie or Cayuga and Susquehannah Railroad," passed April 16, 1852, and mentioned and referred to in said declaration, was passed by the legislature of the State of New York or became a law of said State as in said declaration stated and set forth, and that the said Calvin King, Jonas Wood, and Isaac Smith in said declaration mentioned never were, nor were any or either of them ever, the agents of said town for the purpose of executing or delivering for said town the said writings obligatory or bonds and coupons in said declaration mentioned, or any or either of them in any way, or for any cause or
13 purpose whatsoever, nor were they, the said Calvin King, Jonas Wood, and Isaac Smith, or any or either of them, ever authorized or empowered in any way or manner whatsoever to execute or deliver for said Town of Venice, the defendant herein, the said writings obligatory or bonds and coupons in said declaration mentioned, or any or either of them in any way or for any cause or purpose whatsoever. And this the said defendant is ready to verify. Wherefore the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against the said defendant.

Sixth. And for a further plea in this behalf the said defendant, by leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendant, because the said defendant says that the said writings obligatory or bonds and coupons in said
14 declaration mentioned were not, nor were any or either of them ever executed or delivered for any money borrowed or agreed to be borrowed on the faith and credit of said Town of Venice, the defendant herein, according to the conditions and requirements of said act entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie or Cayuga and Susquehannah Railroad," passed April 16, 1852, by the legislature of the State of New York, and being the same statute mentioned and referred to in the said plaintiff's declaration herein, and that at the time when the said plaintiff became and was the alleged owner, holder, and bearer, as in said declaration mentioned, of each of the said alleged writings obligatory or bonds Nos. 10 & 23 respectively, in said declaration mentioned and referred to, there was due and unpaid on each of said alleged writings obligatory or bonds respectively, a large sum of money, to wit,
15 the sum of two hundred and ten dollars, or thereabouts, for interest then due and unpaid on each of said several supposed writings obligatory or bonds, respectively, according to the conditions and terms of them respectively, that the said plaintiff, at the time when he became the alleged owner and holder and bearer of the said several supposed writings obligatory or bonds, and each of them respectively, he, the said plaintiff, well knew that such interest was due and unpaid on the same respectively, and that he, the said plaintiff, became the owner, holder, and bearer of them and each of them respectively, with such knowledge as aforesaid, and that he, the said plaintiff, is not a bona-fide owner, holder, and bearer of said alleged writings obligatory, or bonds, or either of them, for value, either with or without such knowledge as aforesaid. And this he, the said defendant, is ready to verify.

Wherefore the said defendant prays judgment if the said plaintiff
16 ought to have or maintain his aforesaid action thereof against this the said defendant.

Seventh. And for a further plea in this behalf, the said defendant, by leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against this defendant, because this defendant says that the supervisor of the said town of Venice, and the assessors of said town in office when said act in said declaration mentioned and referred to was passed and became a law as in said declaration stated and set forth, did not nor did any or either of them, or any other person or persons, officer, whomsoever, ever obtain or file in the clerk's office of Cayuga County the written assents of two-thirds of the resident tax-payers of said town as appeared on any assessment-roll whatsoever of said town, as required by said act,
17 and that the said Town of Venice never was authorized or empowered in any way whatsoever, or for any causes or purpose whatsoever, nor was any person or persons whomsoever ever authorized or empowered in any way or manner whatsoever, or for any cause or purpose whatsoever, to borrow any money, or to execute or deliver for the said defendant, the said Town of Venice, the said several writings obligatory or bonds and coupons in said declaration mentioned, or any or either of them, in any way or manner, or for any cause or purpose whatsoever. And this, the said defendant, is ready to verify. Wherefore the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against this the said defendant.

MICHAEL S. MYERS,
Attorney for Defendants, Auburn, N. Y.

WARREN T. WORDEN,
Of Counsel for said Defendant.

18 United States circuit court, northern district of New York:

CAYUGA COUNTY, *ss*:

Herman Moshier, of the town of Venice, in said county of Cayuga, being duly sworn, deposeth and saith that he is the supervisor of the town of Venice aforesaid, and that he has fully and fairly stated the case in this cause to Warren T. Worden, of Auburn, in said county of Cayuga, defendant's counsel in the above cause, and that said defendant has a good and substantial defence upon the merits of said action, as he is advised by his said counsel, and verily believes.

HERMAN MOSHIER, *Supervisor.*

Sworn and subcribed to before me this 3d day of May, 1871.

J. H. CRUM,
Justice of the Peace in and for said County of Cayuga.

19 United States circuit court, northern district of New York.

CAYUGA COUNTY, *ss*:

Herman Moshier, of the town of Venice, in said county of Cayuga, being duly sworn, deposeth and says, that he is the supervisor of the town of *town of* Venice aforesaid, and that he has fully and fairly stated the case in this action or cause to Warren T. Worden, of Auburn, in said county of Cayuga, defendant's counsel in the above cause, and that said

defendant has a good and substantial defense upon the merits to said action, as he is advised by his said counsel and verily believes to be true.

HERMAN MOSHIER, *Supervisor, &c*

Sworn & subscribed to before me this 3d day of May, 1871.
[L. S.] CHAS. F. DURSTON,
Notary Public, Cayuga County, N Y.

20 I hereby certify that I advised the above-named Herman Moshier that the defendant above named has a good and substantial defense upon the merits in the said above action, as stated in the above affidavits of the said Moshier; and I further certify that the above special pleas are, and each and every of them are, in my opinion, well founded.

Dated Auburn, May 3, 1871.

WARREN T. WORDEN,
Of Counsel for said Defendant, The Town of Venice.

21 (Indorsed:) Circuit court U. S. northern district of New York. The Town of Venice ad. Opher Edson. Pleas &c. Michael S. Myers, deft.'s atty., Auburn, N. Y.

Will you please enter my appearance as attorney for the defendant in the within action. Auburn, May 3, 1871.

Yours, &c.,

MICHAEL S. MYERS,
Deft.'s Atty. Auburn, N. Y.

CHARLES MASON, Esq.,
Clerk, &c., Utica, N. Y.

Filed May 5th, 1871.

22 C. C. U. S., N. D. of N. Y.

OPHER EDSON
vs.
THE TOWN OF VENICE.

Of the term of March, that is to say, of this 18th day of May, as yet of the term of March, one thousand eight hundred and seventy-one.

And the said plaintiffs, as to the said plea of the said defendant, by it first above pleaded, and whereof it hath put itself upon the country, doth the like, &c.

And the said plaintiff, as to the said plea of the said defendant by it thirdly above pleaded, says that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because, he says, that the said several causes of action in the said declaration mentioned, and each and every of them, did accrue to the said plaintiff within six years before the commencement of this suit in manner and form as the said plaintiff hath above complained
23 against the said defendant, and this the said plaintiff prays may be enquired of by the country, &c.

And the said plaintiff, as to the said plea of the said defendant by it

fourthly above pleaded, and whereof it hath put itself upon the country, doth the like, &c.

And as to the said plea of the said defendant, by it fifthly above pleaded, the said plaintiff says that he, the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because, he says, the said Calvin King, in said declaration mentioned, was supervisor, and the said Jonas Wood and Isaac Smith, in said declaration mentioned, were assessors, and each of them was an assessor, of the said town of Venice, at the time when said act entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or rail-
24 roads from Lake Ontario to the New York and Erie or Cayuga and Susquehannah Railroad," passed April 10, 1852, and which is mentioned and referred to in said declaration, was passed by the legislature of the State of New York, or became a law of said State, and that the said Calvin King, Jonas Wood, and Isaac Smith, in said declaration mentioned, were, and each and every of them, the agents of said town, for the purpose of executing and delivering for said town the said writings obligatory or bonds and coupons in said declaration mentioned, and each and every of them. And that the said Calvin King, Jonas Wood, and Isaac Smith, as such supervisor and assessors as aforesaid, were duly authorized and empowered to execute and deliver for said town of Venice the said writings obligatory or bonds and coupons in said declaration mentioned, and each and every of them, in the manner, at the time, and for the cause and consideration as in said decla-
25 ration mentioned. And this the said plaintiff pray' may be enquired of by the country.

And the said plaintiff, as to the plea of the said defendant by him sixthly above pleaded, says that he, the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he saith that the said writings obligatory or bonds and coupons in said declaration mentioned were, and each of them was, executed and delivered for money borrowed or agreed to be borrowed, on the faith and credit of said town of Venice, according to the conditions and requirements of said act, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie or Cayuga and Susquehannah Railroad," passed April 16, 1852, by the legislature of the State of New York, and be-
26 cause he says that he, the said plaintiff, is a bona-fide holder, owner, and bearer of said writings obligatory or bonds and coupons, and of each of them, for value. And this he, the said plaintiff, prays may be enquired of by the country, &c.

And the said plaintiff, as to the plea of the said defendant by it seventhly above pleaded, says that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against it, the said defendant, because he says that the supervisor of the said town of Venice, and the assessors of said town, in office when said act in said declaration mentioned and referred to was passed and became a law, as in said declaration stated and set forth, or some other proper person or persons or officers of said town, did obtain and file in the clerk's office of Cayuga County the written assent of two-thirds of the resident tax-payers of said town, as appeared upon the assessment-roll of said town, as required

27 by said act, and that said town of Venice was duly authorized and empowered, in the manner and form provided in said act, by and through the said Calvin King, as supervisor, and the said Jonas Wood and Isaac Smith, assessors of said town, and acting for, on behalf of, and in the name of said town, to borrow money, and to execute and deliver said bonds & coupons to secure the payment thereof, at the times and upon terms as therein specified and therein provided as in said declaration stated.

And this the said plaintiff prays may be enquired of by the country, &c.

D. WRIGHT,
Atty. and of Counsel for Pltffs.

(Indorsed:) C. C. U. S., N. D. of N. Y. Opher Edson vs. The Town of Venice. Replication. D. Wright, pltff.'s atty. Filed May 20, 1871.

28 C. C. U. S., N. D. of N. Y.

OPHER EDSON
vs.
THE TOWN OF VENICE.

Of the term of March, one thousand eight hundred & seventy-two.

And the said plaintiff now comes into court, and as to his demurrer to the said second plea of the said defendant, by leave of the court for that purpose first had and obtained, says that he hereby withdraws the same.

And to the said plea by the said defendant by it secondly above pleaded, the said plaintiff says that he, the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he says that the portion of the said several sums of money alleged to have accrued upon said alleged written obli
gations or bonds and coupons in said several counts of said decla-
29 ration mentioned, which became due and payable on or before the first day of January, eighteen hundred and sixty-five, and each and every of them, did accrue to the said plaintiff within six years before the commencement of this suit in manner and form as the said plaintiff hath above complained against the said defendant; and as to the remaining portion of the said several sums of money, in the said several counts of said plaintiff's declaration mentioned, the said defendant does owe the same and each and every item thereof, in manner and form as he, the said plaintiff, has above thereof complained against the said defendant, and of this the said plaintiff puts himself upon the country, and the said defendant does the like, &c.

D. WRIGHT,
Plff.'s Atty.

(Indorsed:) C. C. U. S., N. D. of N. Y. Opher Edson *vs.* The Town of Venice. Replication to second plea. D. Wright, pltff.'s atty. Filed May 4, 1872.

30 United States circuit court, northern district of New York.

THE TOWN OF VENICE
ads.
OPHER EDSON.

And the said defendant comes here into court and says that, by leave

of the court here for that purpose first had & obtained, it withdraws the demurrer by it pleaded to the replication of the said plaintiff to the sixth plea of the defendant herein.

And the said defendant says that, as to the said replication of the said plaintiff to the said sixth plea of the said defendant, and which the said plaintiff hath prayed may be enquired of by the country, the said defendant doth the like, &c.

WARREN A. WORDEN,
Deft.'s Atty., Auburn, N. Y.

WARREN T. WORDEN,
Of Counsel.

31 (Indorsed:) U. S. circuit court, northern district of New York. The Town of Venice ads. Opher Edson. Copy. Similiter to plff.'s replication to defendant's sixth plea. Warren A. Worden, deft.'s atty., Auburn, N. Y. Rec'd June 12, '72. Filed as of June 12, 1872.

32 And thereupon the issue above joined came on to be tried at the March term of said court, held at the city of Utica, on the 21st day of March, A. D. 1873, before the honourable Lewis B. Woodruff, judge, and a jury; at which day and place last aforesaid came the parties aforesaid by their attorneys aforesaid, and the jurors of the jury summoned to try the said issue being empannelled and sworn, after hearing the evidence offered in said cause, say, upon their oath, that the said defendant is guilty of the premises above laid to its charge, in manner and form as the said plaintiff hath above complained against it, and they assess the damages of said plaintiff by reason of the premises, over and above his costs and charges by him about his suit in this behalf expended, to three thousand four hundred and forty-three dollars and fifty-six cents.

33 At an adjourned term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the city of Utica, on Friday, the 21st day of March, in the year of our Lord one thousand eight hundred and seventy-three.

Present, the honourable Lewis B. Woodruff, judge.

OPHER EDSON
vs.
THE TOWN OF VENICE.

Ordered, that the defendant have forty days to make and serve a bill of exceptions, and that, in the mean time, all other proceedings be stayed.

34 Therefore it is considered and adjudged that the said plaintiff, Opher Edson, do recover against the said defendant, the Town of Venice, his said damages by the jurors aforesaid, in form aforesaid assessed, and interest thereon for one hundred and ninety-two days, amounting to one hundred and twenty-eight dollars and fifty-six cents, and also fifty-one dollars and forty-five cents for his costs and charges by the court here adjudged, of increase to the said plaintiff with his assent, which said damages, interest, costs, and charges, in the whole, amount to three thousand six hundred and twenty-three dollars and fifty-seven cents.

And said defendant, in mercy, &c.

Judgment signed this 29th day of September, A. D. 1873.

CHARLES MASON, *Clerk.*

35 (Indorsed:) U. S. circuit court, north. dist. of N. Y. Opher Edson vs. The Town of Venice. Judgment record. David Wright, plff.'s atty. Damages, $3,443.56; interest, 128.56; taxed costs, 51.45—$3,623.57. Filed September 29, 1873, 4 o'clock p. m.

36 *Bill of exceptions on behalf of the defendant.*

Circuit court of the United States, second circuit, northern district of New York.

THE TOWN OF VENICE *ads.* OPHER EDSON.

Afterwards, to wit, at a circuit court held at the city of Utica, in the county of Oneida, in and for the northern district of the State of New York, on the eighteenth day of March, eighteen hundred and seventy-three, by and before the honorable Lewis B. Woodruff, circuit judge for said district, came the parties aforesaid, by their attorney aforesaid, and also by their respective counsel, and the issues thus joined came on to be tried, and were then and there tried by and before said judge and a jury.

And the said plaintiff, in order to maintain the issues on his part, produced and read in evidence the act of the legislature of the State of New York, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a rail-
37 road or railroads from Lake Ontario to the New York and Erie or Cayuga and Susquehannah Railroad," passed April 16th, 1852.

The plaintiff then produced and read in evidence a certified copy of the articles of incorporation of the Lake Ontario, Auburn and New York Railroad Company mentioned and referred to in the pleadings in this cause, which articles of association provided for the construction and operation of a railroad from some point on Little Sodus Bay, in the county of Cayuga and State of New York, passing through the towns of Sterling, Victory, city of Auburn, and towns of Fleming, Scipio, Venice, and Genoa, in said county of Cayuga, and into the county of Tompkins, in said State of New York, to a point on the Cayuga and Susquehannah Railroad in said county of Tompkins, about seven miles from Ithaca. The said plaintiff then produced the two several alleged bonds, coupons, and clerk's certificate mentioned and referred to in the declaration, and proved by the admission of the defendants' attorney & counsel,
38 that the signatures to the same were genuine and that the said Calvin King was elected supervisor, and the said Jonas Wood and Isaac Smith, railroad commissioners, on the first day of March, eighteen hundred and fifty-three, that being the first Tuesday of March, and the day appointed by law for holding the town meeting for the election of town officers in that year.

The plaintiff proved said signatures to be genuine, and that the said King was elected supervisor, and the said Wood and Smith railroad commissioners, at said town meeting held in and for said town of Venice, on the said first day of March, eighteen hundred and fifty-three.

The counsel for said plaintiff then produced and read the said certificate of the clerk of Cayuga County in evidence, which certificate, under the hand of said clerk, was endorsed upon each of said bonds.

The said certificate was in the words and figures following, to wit:

"Cayuga County, clerk's office. I, Edwin B. Marvine, clerk of the

county of Cayuga, hereby certify that a paper purporting
39 to be the written assent of two-thirds of the resident tax-payers of the town of Venice, with the affidavit required by sec. 1 of the act referred to by its title in the foregoing bond, has been filed in this office.

"Dated Auburn, May 16th, 1853.

(Signed) "E. B. MARVINE,
"*Clerk of Cayuga County.*"

The counsel for the said plaintiff then offered to read in evidence the said several bonds with the coupons thereto attached, as mentioned and referred to in said declaration, and to which the counsel for the defendant objected, and contended that the alleged bonds having been issued under a special statute, and that statute having pointed out and provided the mode and manner by which the money should be raised with which to pay them, that said statute formed a part and portion of the alleged bonds, as much so as if the same was incorporated in them, and that the payment of the same must be enforced in the mode and manner
40 pointed out by the statute, and that this action could not be maintained.

The counsel for the defendant then and there also further objected to the reading of said bonds and coupons in evidence unless it was proved that the assents of the tax-payers of said town had been obtained or filed in the clerk's office of Cayuga County, as required by said act.

The counsel for said defendant then and there further objected to the reading of said bonds and coupons in evidence unless it was proved that an affidavit had been made and attached to said assents, and filed in the clerk's office of Cayuga County, as required by said act.

The counsel for said defendant then and there further contended that until such assents were obtained and filed, the said Calvin King, Jonas Wood, and Isaac Smith, had no power or authority to execute said alleged bonds, or do anything under said act until such assents were obtained and filed, as required by said act.

The counsel for said defendant then also further objected to the
41 reading of said bonds and coupons in evidence, and contended that the said Calvin King, Jonas Wood, and Isaac Smith could not become agents of the town under said act for the purpose of executing said alleged bonds prior to the obtaining and filing of the assents as required by said act, and until after such assents had been obtained and filed as aforesaid.

The counsel for said defendant then also further objected to the reading of said bonds and coupons in evidence, because it was not proved that the supervisor and assessors in office when said act was passed and became a law accepted of the same, and contended that some act or thing must be done indicating in some way an acceptance of said act prior to the said election in March, 1853, and contended that such election of commissioners was only authorized in towns which had accepted said act, or done some act under the same prior to said election on the first day of March, 1853.

42 The counsel for said defendant further objected to the reading of said alleged bonds in evidence, because, by the terms of said bonds, the first installment or payment of interest was made payable in a less time than six months after the date of said bonds, to wit, on the first day of July thereafter, and that therefore they did not conform to the requirements and conditions of said act, and were therefore not such bonds as were authorized by the act in question.

The counsel for said defendant further objected to the reading of said alleged bonds in evidence, because the interest secured to be paid in and by the same exceeded seven per cent. per annum.

The counsel for said defendant further objected to the reading of the said alleged bonds and coupons in evidence unless it was proved that they were executed and delivered for money borrowed. The court thereupon ruled and allowed the said bonds and coupons to be read in evidence. To which ruling and allowance the counsel for the de-
43 fendant duly excepted, and the said exception was duly noted.

Whereupon said bonds were then read in evidence, together with the interest coupons which had become due within six years next previous to the commencement of said suit. That plaintiff then offered to prove the interest due upon said bonds from the first day of July, 1856, to the time of trial, to which the counsel for said defendant objected, upon the grounds that under the pleadings, the statute of limitations having been pleaded, the plaintiff was not entitled to recover interest beyond six years from the time of the commencement of this suit, which objection was sustained by the court.

The said bonds were exact duplicates of each other, except as to their numbers, one being numbered 10, and the other 23, and a copy of one of which said bonds is hereunto annexed, marked "Schedule A." The interest coupons were exact copies of each other except as to the time of payment, and the numbers of the bonds to which they were at-
44 tached, a copy of one of which coupons is hereunto annexed, and marked "Schedule B."

And here the plaintiff rested.

The counsel for said defendant then produced from the office of the county treasurer of Cayuga County a book, which was claimed by the defendant's counsel to be the assessment roll of said town of Venice, for the year of eighteen hundred and fifty-two, and offered to show, affirmatively, that taking all the names on said alleged assents, hereinafter produced as genuine, the same did not amount to two-thirds of the resident persons taxed in said town, as appeared on said alleged assessment-roll of said town. The counsel for the said plaintiff then and there objected to the introduction of said alleged assessment-roll in evidence, on the ground that the same is not proved to be and is not in fact the assessment-roll of said town; that the same was neither signed nor certified to by the assessors of said town, and because the same did not contain the affidavit of the assessors as required by the statutes of the State of New York.

45 His honor, the judge, sustained said objection and excluded said book, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there noted.

The defendant then proved that the said several bonds and coupons were in the first instance, and on or about the eleventh day of October, 1853, delivered by the said Jonas Wood to the Lake Ontario, Auburn and New York Railroad Company in payment for stock in said company, signed for and script therefor received by the said Calvin King, Isaac Smith, and Jonas Wood, in the name of and for said town, and that that was the first negotiation, issuing and delivering of said instruments by the persons above mentioned. The defendant then proved that Benjamin Gould, esq., of Cayuga County, became the owner and holder of the said several bonds and coupons mentioned and referred to, some time in eighteen hundred and fifty-four, and so continued to be such owner and holder of the same from that time forward, up to and until

46 on or about the first day of September, eighteen hundred and sixty-seven, when he disposed of the same.

The counsel for said defendant then requested his honor the judge to hold and decide that on above proof the mere production of said bonds by the plaintiff did not prove him to be such a bona-fide owner and holder of said bonds, and that the plaintiff must now, under the proof above offered, go further and prove that he actually paid value for the same, purchasing them in the ordinary course of business and without knowledge of their original delivery as aforesaid, but his honor the judge declined to pass upon that question at the then stage of the trial; to which ruling and decision of his honor the judge the counsel for the said defendant then and there excepted, and the same was then and there noted.

The counsel for the defendant then produced from the files of the clerk's office of Cayuga County aforesaid the original assents of
47 the tax-payers of the said town of Venice, filed therein Nov. 3d, 1852, with the affidavit of the supervisor and assessors underwritten thereon, and offered such assents in evidence without the affidavit. The plff.'s counsel insisted that the affidavit should be read therewith; and the court ruled that the affidavit might be read therewith, to which the defendant's counsel excepted, and declined to read such assents.

The counsel for said plaintiffs then read from the files of the clerk's office of Cayuga County the original assents of the tax-payers of said town of Venice, which were filed in said clerk's office on the third day of November, one thousand eight hundred and fifty-two, and which included two hundred and fifty-nine names in the aggregate, and which were signed to assents of which the following is a copy, to wit:

"We, the undersigned, resident tax-payers of the town of Venice, in county of Cayuga, do hereby consent that the supervisor and assessors of said town may borrow, on the faith and credit of said town, such a sum of money as they may deem necessary, not exceeding the sum of
48 twenty-five thousand dollars, for a term not exceeding twenty years, at such rate of interest as may be agreed upon, not exceeding seven per cent. per annum, and to execute therefor, under their official signatures, a bond or bonds on which the interest shall be made payable annually or semi-annually during the term said money be borrowed, and the principal and interest made payable in such sums and at such times and places as shall be agreed upon and expressed in the bonds so to be executed, and that the money so borrowed may be paid to the president and directors of a railroad company organized according to the requirements of the general railroad law for the purpose of constructing a railroad connecting Lake Ontario with the Susquehannah and Cayuga Railroad, and passing through the city of Auburn, upon the stock of said railroad company to be subscribed for and taken by said supervisor and assessors, in name of and for said town."

And endorsed upon said original assents there was an affidavit,
49 of which the following is a copy, to wit:

"STATE OF NEW YORK, *Cayuga County, ss:*

"Luke H. Mills, supervisor of the town of Venice, in said county, and William Jones, one of the assessors of said town, being duly sworn, depose and say, and each for himself say, that the persons whose names are subscribed to the several foregoing written assents hereto attached

comprise two thirds of all the resident tax-payers of said town of Venice, on the assessment-roll next previous to the date hereof.

(Signed) "LUKE H. MILLS, *Supervisor.*
"WILLIAM JONES, *Assessor.*

"Dated October 30th, 1852.

"Sworn and subscribed to before me this 30th day of October, 1852, ss.
"LYMAN MURDOCK,
"*Justice of the Peace in said County.*"

And the counsel for said plaintiff then offered to read said assents and said affidavits in evidence, to which the said counsel for said defendant objected upon the ground that said counsel for said plaintiff must first prove the signatures signed to said assents to be the genuine signatures of those whose names purported to be signed thereto,
50 which objection was then and there overruled by said court, and to which decision the said counsel for said defendant then and there, in due time and form, excepted, and said exception was then and there duly noted by said judge, and said assents and the heading thereto, and for said affidavit was then and there read in evidence by said counsel the said plaintiff.

The counsel for said defendant also gave evidence tending to prove that on election day in November, 1853, William Sprague signed a paper, without any caption or heading whatsoever, that he was opposed to bonding; that those who presented said paper to him stated that they wanted his name to be attached to a petition or paper in relation to the location of a depot in said town, and that for that purpose he signed his name on a piece of paper on which were several other names; that said paper, with his name on it, is now attached to said assents and forms a part of the same. He also produced the testimony of eleven other persons whose names appear subscribed to the said assents, whose testimony tended to show that they did not sign any assent to the bond-
51 ing of the town of Venice. The counsel for the defendant then proved by the stipulation of the plaintiff's attorney, that while Benjamin Gould held the bonds in question, he brought suit thereon and recovered judgment, and that such judgment was reversed in the State court on appeal, and the suit was by him thereupon discontinued.

The evidence being closed, it was then admitted by the counsel for the defendant, that if the plaintiff was entitled to recover, he was entitled to recover seven hundred and twenty-one dollars and twenty-eight cents interest, and one thousand dollars of principal upon each of said bonds, making the aggregate, for principal and interest upon said two several bonds, the sum of three thousand four hundred and forty-three dollars and fifty-six cents.

The counsel for the defendant then requested his honor the judge to charge the jury that on the above proof, the plaintiff was not entitled to recover. His honor the judge declined so to charge the jury, and
52 to which the counsel for the said defendant then and there excepted, and the same was then and there noted.

His honor the judge then, at the request of the plaintiff's counsel, charged the jury that the said plaintiff was, on the above proof, entitled to a verdict, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there noted.

The jury then, by direction of the court as aforesaid, found their verdict for the plaintiff for three thousand four hundred and forty-three dollars and fifty-six cents. And because none of the said exceptions so offered

and made to the opinions and decisions of the said circuit judge do appear upon the record of the said trial, therefore on the prayer of the said defendant by his said counsel, the said circuit judge hath to this bill of exceptions set his hand and seal, according to the statute and the rules and practice of this court in such case made and provided, this first day of September, 1873.

L. B. WOODRUFF. [L. S.]

WARREN A. WORDEN,
Deft.'s Atty., Auburn, N. Y.

WARREN T. WORDEN,
Of Counsel.

53 *Schedule "A."*

STATE OF NEW YORK, *County of Cayuga:*

Seven per cent. loan not exceeding $25,000.

Be it know that the town of Venice, in the county of Cayuga, and State of New York, in pursuance of an act of the legislature of the said State, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie or Cayuga and Susquehannah Railroad," passed April 16th, 1852, and for the purpose of aiding the construction of the Lake Ontario, Auburn and New York Railroad, owes and promises to pay to or bearer one thousand dollars, with interest at the rate of seven per cent., payable semi-annually, on the first days of January and July in each year, on surrender of the coupons hereto attached, at the Bank of the State of New York, in the city of New York, the principal to be reimbursable at the same place at the expiration of twenty years from first day of January, 1853.

54 In testimony whereof the supervisor and commissioners of the town of Venice have, pursuant to the provisions of the act aforesaid and the written assent of two-thirds of the resident tax-payers of said town, obtained and filed in the office of the clerk of the county of Cayuga, hereunto subscribed their names this second day of March, A. D. 1853.

CALVIN KING,
Supervisor.
JONAS WOOD,
ISAAC SMITH,
Commissioners.

$35. *Schedule "B."*

The Town of Venice, in the county of Cayuga, hereby acknowledge that their will be due the bearer thirty-five dollars, payable at the Bank of the State of New York, in the city of New York, on the first day of July, 18 , being interest due on that day on bond No. .

CALVIN KING,
Supervisor.
JONAS WOOD,
ISAAC SMITH,
Commissioners.

(Indorsed:) C. C. U. S. N. D. of N. Y. The Town of Venice ads. Opher Edson. Bill of exceptions on behalf of defendant. Warren A. Worden, deft.'s att'y, Auburn, N. Y. Filed by counsel of both parties as of the 12th day of September, 1873.

55 Know all men by these presents that we,

all of the town of Venice, in the county of Cayuga, and State of New York, are held and firmly bound unto Opher Edson in the sum of eight thousand dollars, to be paid to the said Opher Edson, or his certain attorney, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, and severally, firmly by these presents.

Sealed with our seals and dated this first day of October, one thousand eight hundred and seventy-three.

Whereas the Town of Venice aforesaid is about to prosecute a writ of error from the Supreme Court of the United States to reverse a judgment rendered by the circuit court of the United States, second circuit and northern district of New York, in a certain action wherein the said Opher Edson was plaintiff and the said Town of Venice
56 was defendant, for three thousand six hundred and twenty-three dollars and fifty-seven cents, damages and costs, and the record of which was filed with the clerk of the said United States circuit court for the northern district of New York, at his office in the city of Utica, on the twenty-ninth day of September, eighteen hundred and seventy-three:

Now, therefore, the condition of this obligation is such that if the said Town of Venice above named shall prosecute its said writ of error to effect, and answer all damages & costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WM. N. BALDWIN. [L. S.]
BENJAMIN A. ARNOLD. [L. S.]
ALONZO STUART. [L. S.]
A. T. ARNOLD. [L. S.]
ELIHU SLOCUM. [L. S.]

Circuit court of the United States, second circuit & northern district of New York.

UNITED STATES OF AMERICA,
State of New York, Cayuga County, ss:

57 William N. Baldwin, Benjamin Arnold, Alonzo Stuart, Albert T. Arnold, Elihu Slocum, being duly sworn, depose*th* and say*s*, and each for himself says that he is a householder and freeholder in and residing in the town of Venice, in said county of Cayuga, and State of New York, and that he is worth the sum of four thousand dollars over and above all debts & liabilities which he has incurred, and property exempt from execution. And further thi*s* deponent' say*s* not.

WM. N. BALDWIN.
BENJAMIN A. ARNOLD.
ALONZO STUART.
A. T. ARNOLD.
ELIHU SLOCUM.

Sworn & subscribed to before me this 3d day of October, 1873.

W. W. MANCHESTER,
Notary Public for Cayuga County, N. Y.

58 Circuit court of the United States, second circuit and northern district of New York.

UNITED STATES OF AMERICA,
State of New York, Cauuga County, ss:

On this 3d day of October, one thousand eight hundred and seventy-three, personally came and appeared before me Wm. N. Baldwin, Benjamin A. Arnold, Alonzo Stuart, Albert T. Arnold, Elihu Slocum, to me personally known to be the same persons described in and who executed the annexed & preceding bond or undertaking, and severally acknowledged the due execution of the same.

W. W. MANCHESTER,
Notary Public, Cayuga County, N. Y.

59 (Indorsed:) The Town of Venice to Opher Edson. Bond.

Upon the consent of the attorney or the plaintiff above within, declaring it to be satisfactory, I approve of the within bond.
Oct. 6, 1873.

L. B. WOODRUFF,
Circ't Judge.

Filed October 8, 1873.

60 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the judges of the circuit court of the United States for the second circuit and northern district of New York, greeting:

Because in the records & proceedings, and also in the rendition of judgment of a plea which is in the said circuit court and northern district of New York, before you, between Opher Edson, plaintiff, and the Town of Venice, in the county of Cayuga and State of New York, a manifest error hath happened, to the great damage of the said Town of Venice, as by its complaint appears: We, being willing that the error, if any hath been, should be duly corrected, & full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly & openly, you send the record & proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the fourth Monday of October instant, in the said Supreme Court to be then & there held, that, the record & proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws & customs of the United States should be done.

Witness the Hon. Nathan Clifford, senior associate judge and acting Chief-Justice of the said Supreme Court, the sixth day of October, in the year of our Lord one thousand eight hundred & seventy-three.

Allowed by—

L. B. WOODRUFF,
Circuit Judge.

CHARLES MASON,
Clerk of the Circuit Court of the United States for the Northern District of New York.

(Indorsed:) Supreme Court of the United States. The Town of Venice, plaintiff in error, vs. Opher Edson, defendant in error. Writ of error. To file. Filed Oct. 8, 1873.

61 UNITED STATES OF AMERICA, *ss:*

To Opher Edson, greeting:

You are hereby cited & admonished to be & appear at a Supreme Court of the United States to be holden at Washington on the fourth Monday of October instant, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the second circuit & northern district of New York, wherein the Town of Venice is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected & speedy justice should not be done to the parties in that behalf.

Witness the Hon. Nathan Clifford, senior associate judge & acting Chief-Justice of the said Supreme Court of the United States, this sixth day of October, in the year of our Lord one thousand eight hundred & seventy-three.

L. B. WOODRUFF,
Circuit Judge.

62 UNITED STATES OF AMERICA,
Northern District of New York,
State of New York, Cayuga County, ss:

Warren A. Worden, of Auburn, in said county & district, being duly sworn, says that on the 9th day of October, 1873, he personally served a copy of the within citation on David Wright, esq., the plff.'s attny., personally, by handing the same to & leaving it with him, at Auburn aforesaid.

WARREN A. WORDEN.

Sworn & subscribed to before me this 9th day of October, 1873.
CHARLES L. ADAMS,
U. S. Commissioner, Northern Dist. of N. Y.

(Indorsed:) Supreme Court of the United States. The Town of Venice, plaintiff in error, vs. Opher Edson, defendant in error. Citation. To file.

I admit due & personal service of a copy of the within citation this 9th day of October, 1873.

D. WRIGHT,
Atty. for Plff. below.

Filed Oct. 10, 1873.

63 United States circuit court, northern district of New York, *ss:*

I, Charles Mason, clerk of the circuit court of the United States of America for the northern district of New York, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of Opher Edson vs. The Town of Venice.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Utica, in said district, this 23d day of October, A. D. 1873.

[SEAL.] CHARLES MASON, *Clerk.*

(Indorsement on cover:) No. 310. The Town of Venice, plaintiff in error, vs. Opher Edson. N. New York, C. C. U. S. Filed 28th October, 1873.

SUPREME COURT,
UNITED STATES.

THE TOWN OF VENICE,
Plaintiff in Error,

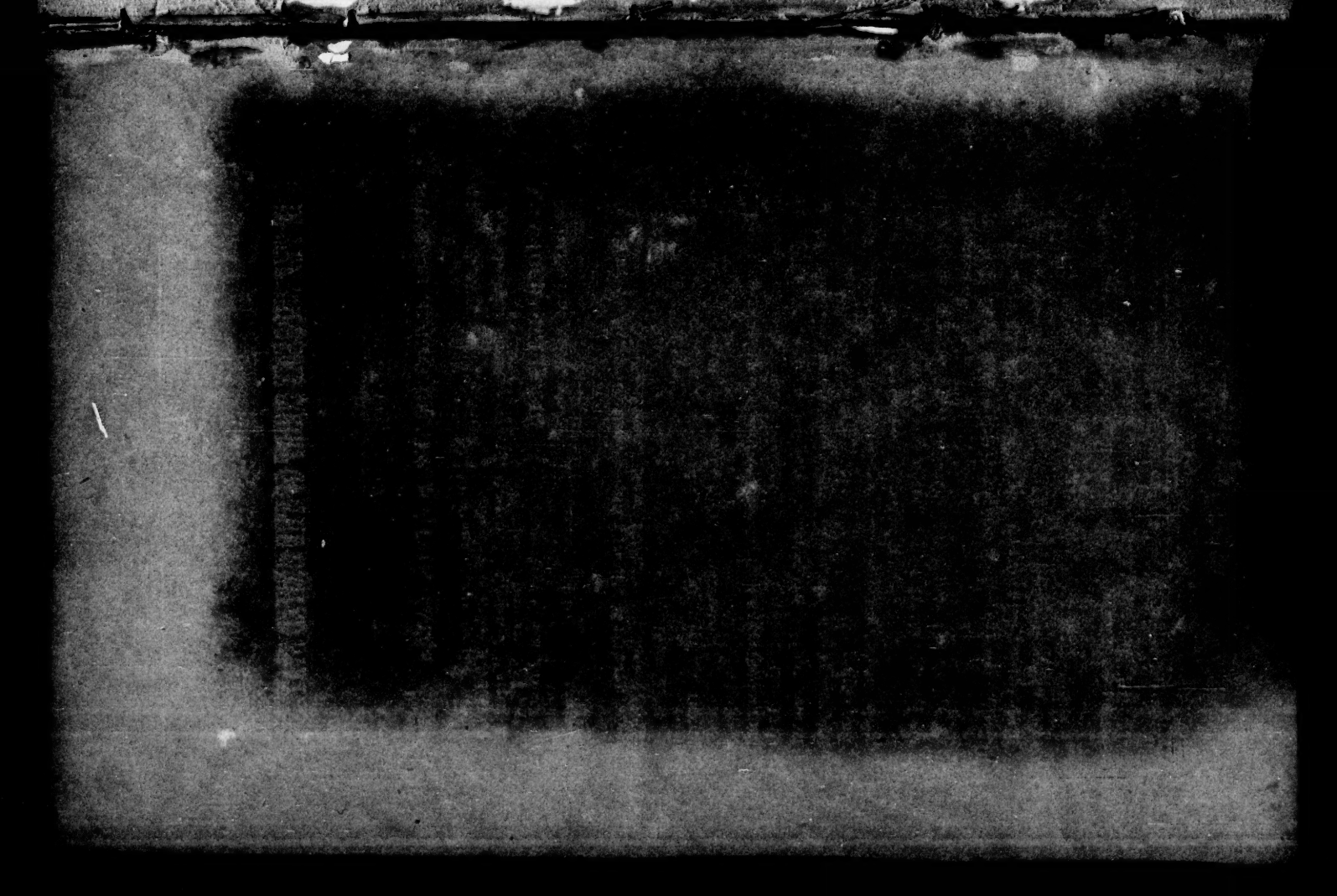
ag'st

EVANDER MURDOCK,
Defendant in Error.

Abstract and Statement of Case, with Assignment of Errors, &c., on the part of the Plaintiff in Error.

WARREN A. WORDEN,
Pl'ff's Attorney, Auburn, N. Y.

AUBURN:
WM. J. MOSES' PUBLISHING HOUSE, 16 CLARK ST.
1874.



IN THE SUPREME COURT OF THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES.

THE TOWN OF VENICE,
Plaintiff in Error,
vs.
EVANDER MURDOCK,
Defendant in Error.

Brief and Points on the part of the Pl'ff in Error, No. 264.
Warren T. Worden & Warren A. Worden, of Auburn, N. Y., of counsel for Pl'ff in Error.
David Wright, Esq., of Auburn, of counsel for Def'nt in Error.

Writ of Error to the Second Circuit, Northern District of New York.

I.

A CONCISE ABSTRACT OR STATEMENT OF THE CASE ON THE PART OF THE PLAINTIFF IN ERROR.

This cause was tried at a circuit court, held at Canandaigua, in and for the Northern District of New York, on the 17th day of June, 1873, by and before the Hon. Ward Hunt, one of the Associate Justices of this court. The trial was rather *pro forma* than otherwise, counsel laboring to have the points and questions so presented and ruled upon, as to bring them fairly before this court, for consideration and review.

The bill of exceptions was agreed upon by the counsel for the respective parties, and signed by his Honor the Judge, as thus agreed upon.

The cause was tried by a jury; and the jury, by the direction of his Honor the Judge, found a verdict for the plaintiff below, for the sum of fifteen thousand six hundred and twenty-six dollars.

The above statement, as well as the following, is partly historical. It is believed both are within the rule; if not strictly so, as they tend to illustrate the questions involved,

and will aid materially in a right understanding of them, it is hoped and believed that if any variation from the rule exists, it will be excused.

This cause arises in an action brought to recover the amount claimed to be due on certain bonds alleged to have been issued in accordance with a statute of the State of New York, passed April 16, 1852, entitled "An act to authorize any "town in the county of Cayuga to borrow money for aiding in "the construction of a railroad or railroads from Lake Ontario "to the New York & Erie or Cayuga & Susquehannah Rail-"road." See Session Laws for the State of New York for 1852, page 593, chapter 375.

A copy of said act in full is hereunto annexed, marked Schedule A.

Opposition to the principles of the act in question existed among the tax-payers of the town *before* the act became a law; thus preventing the obtaining of the signature of two-thirds of the resident tax-payers of the town to the assents referred to in said act. This fact has been judicially determined in an action in the Supreme Court of the State of New York.

> 1 New York Supreme Court Reports, 130, The Town of Venice vs. Breed. See Statement of the finding of facts, at page 133.

The same feeling resulted in the election of a Supervisor for the town, who refused to report in favor of raising the money with which to pay the interest on the bonds alleged to have been issued under said act, (among which are those in suit.)

In consequence of the Supervisor of the town of Venice having reported as aforesaid, to the Board of Supervisors, at their annual meeting in 1857, that said town had no bonds outstanding, issued in accordance with the act in question, and that there was no interest due, or to grow due on any such bonds, and the Board having refused to raise any money with which to pay interest, an application was made to the Supreme Court in the Seventh Judicial District of the State of New York, at the December General Term of that court in 1857, for a manda-

mus to compel the Supervisor to report, and the Board to raise the money. The case was kept under advisement till the next March General Term of the court, when Mr. Justice Johnson delivered the opinion of the Court, a copy of which is annexed to these points, marked schedule B.

It *is to the latter part of that opinion*, that counsel desires to call the attention of the Court.

The parties having thus failed to compel the money to be raised by mandamus, several actions were commenced against the towns of Scipio, Venice, Sterling and Genoa, to recover the interest due on the alleged coupons and bonds, thereby bringing directly in issue the question, "whether the bonds were ever, in "fact, issued so as to become chargeable upon the towns, or in "other words, whether the bonds had been legally issued, so as "to become binding upon the towns."

Among the suits so commenced, were two against the town of Venice, and two against the town of Genoa. Each town put in a demurrer in one of the suits against it, and plead to issue in each of the others. The demurrers were brought to argument at a Special Term of the Supreme Court, in the Seventh District, before Mr. Justice Welles. A copy of his opinion will be found annexed to these points, marked Schedule C.

It will be perceived that several of the bonds and coupons now in suit, were among those sued upon and attempted to be recovered upon in the Supreme Court of the State of New York. See Record, folios 53 and 54, page 14.

From the decision of Judge Welles, the plaintiffs in each case appealed to the General Term, and his decision was reversed.

The defendants then answered, and all four of the causes, as well as those against the town of Sterling, were tried, and judgments rendered for the plaintiffs. From those judgments the towns appealed to the Court of Appeals, and all of them were reversed, and new trials ordered. The suits were then discontinued, and the parties went out of court.

23 New York Reports, 439, Starin vs. Town of Genoa.
23 New York Reports, 456, Gould vs. Town of Sterling.

The Legislature adopted and approved of the construction by the Court of Appeals, of the statute in question, and conformed its subsequent legislation to it, in authorizing the future issue of bonds in any town.

"Such affidavit shall be valid and conclusive proof . . . . . "to authorize and uphold . . . the issue of bonds to the amount "specified in such proof for such towns respectively, and no "clerical or other defect in any such affidavit shall invalidate "such proof," &c. Laws of said State for 1864, page 911, in relation to the Albany & Susquehannah Railroad.

See also

Laws of 1865, page 1497, §2, in relation to the towns of Otsego and others borrowing money.
Laws of 1866, page 810, §2, in relation to the Utica & Chenango & Susquehanna Railroad Company.
Laws of 1866, page 1328, in relation to the Black River Railroad Company.
Laws of 1867, page 43, §3, authorizing the town of Johnstown to borrow money.
Laws of 1867, page 401, §2, in relation to the Skaneateles Railroad.
Laws of 1866, vol. 2, page 1425, §2.
Laws of 1867, page 1714, chap. 672.

The Court of Appeals reversed the judgment of the General Term, on grounds which left the opinion of Judge Welles to stand as the law of the case. It is therefore now referred to, as illustrative of the questions involved, and as a part of the history of the case.

That the Court may see that we are not mistaken as to what was decided in the Court of Appeals, it is referred to the following extract from Judge Lott's opinion in Starin vs. the Town of Genoa, 23, N. Y. R., 449. "2nd. The next, and an "important question presented is whether it was imcumbent on "the plaintiff to show affirmatively that the assent of the tax-"payers required to be obtained by the said act, had in fact "been obtained."

In consequence of these repeated decisions in the State

Courts against the validity of the bonds in question, the holders of the several bonds alleged to have been issued, by virtue of the statute in question, applied to the Legislature of the State of New York for an enabling act.

The following is a copy of the proposed act:

"AN Act to amend section 1, of chapter 375, of the laws of "1852.

"Passed, three-fifths being present.

"*The People of the State of New York, represented in Senate "and Assembly, do enact as follows:*"

"SECTION 1. The first section of chapter 375, of the laws of "1852, is hereby amended, by adding thereto the following:

"And which affidavit so made and filed shall be conclusive "evidence of the truth of the facts therein stated.

"§ 2. This act shall take effect immediately."

"STATE OF NEW YOBK,
"Senate Chamber, Albany, June 8, 1868.

"I certify that I have compared the foregoing with "the original bill, as introduced into the Senate of "[L. S.] this State, by Senator Munger, on the tenth day of "February, 1864, and that the same is a just and "true copy thereof.

"JAMES TERWILLIGER,
"CLERK OF SENATE."

See Senate Journal, State of New York, for 1864, p. 150.

The following copy of a letter from then Senator, now Judge Folger, of the Court of Appeals, gives a correct history of the result of that application:

"GENEVA, N. Y., June 10, 1868.

"WARREN T. WORDEN, ESQ., *Dear Sir:*—I have yours of the 9th inst.

"I do not remember that the bill to which you refer ever became a law. I do not find it in the Session Laws of 1864. The Senate Journal of that year shows, that the bill was introduced by Senator Munger, and referred to the Judiciary Committee; that Senator Murphy, representing a majority of that Committee, reported the bill favorably, showing (as was the

fact) that I was opposed to reporting the bill favorably; that the bill was afterwards re-committed, and that I, as Chairman of the Committee, reported adversely upon the bill, and that it was rejected. I do not think that it became a law. I am quite certain that it did not in 1864.

"The law was applied for in behalf of the bondholders, as was well understood, in the discussions before and in the Judiciary Committee. If this was not expressly stated by David Wright, Esq., who advocated the bill before the Committee, it was inferred from the fact that he was known to have been of counsel for those holding the bonds, in the litigation which had been had in regard to those bonds. The bill was asked for to avoid certain difficulties which had been met in making proof of the assent of officials or assessed persons.

"The Committee on Judiciary kept no journal such as you indicate. It kept a book like to a lawyer's Register. A memorandum of dates and acts, but not an entry of reasons.

"If I remember aright, David Wright and Jno. K. Porter appeared before the Committee and argued in favor of the bill, that it was needed to enable the holders of bonds to meet certain difficulties in proofs. Yourself and Mr. Marsh of Oswego appeared and opposed the bill, on the ground that its passage would disturb vested rights.

"I believe this is substantially what you ask for, and this presents the facts of the matter as I remember them.

"Yours resp't'ly, &c.,

"CHAS. J. FOLGER."

Having thus failed to obtain the passage of an enabling act, another effort was made to obtain a modification or reversal of the previous decisions of the Court of Appeals — and two other causes were accordingly carried to that Court for that purpose. Only one of them is reported.

36 New York Reports, 224, The People vs. Mead.

The Court of Appeals refused to depart from its former decision.

The latter causes were decided in March, 1867, some three

years after the introduction into the Legislature of the enabling act, above referred to.

In one of the cases thus subsequently carried to the Court of Appeals, and involving some of the questions now before the Court, Judge Grover, one of the Judges of that Court, (probably without knowing the effort and failure which had been made to procure an enabling act in behalf of the bond holders *and the reasons for that failure,*) expressed among others, the following views:

"The Legislature can, and probably will, relieve the plain-
" tiff and others similarly situated, upon equitable terms, but I
" am unable to see how the courts can furnish a remedy, with-
" out a violation of principle."

36 N. Y. Reports, page 230, The People vs. Mead.

From the foregoing statement it will be perceived, that some of the questions which legitimately arise in this case, have repeatedly been passed upon by the Justices of the Supreme Court of the State of New York, and in the Court of Appeals of that State.

Others are among those " positions," spoken of by Mr. Justice Welles as " taken by the defendant's counsel in support of the demurrer," which he " deemed not necessary to consider," having disposed of the demurrer on other grounds in favor of the defendants; *and others which arise now for the first time, never having been passed upon in any Court or by any Judge.*

At one of the General Terms of the Supreme Court of said State, after counsel for the defendants had concluded to submit, on printed points and briefs, one of the questions above referred to, the Court handed back the papers and requested an oral argument in addition; and when the causes, which were taken to the Court of Appeals, reached that Court, the Court ordered them argued out of their order on the calendar; and when one of the counsel arguing them, apologized for the length of time he was taking, the presiding Judge informed him that no apology was necessary, as no restriction as to time would be required or enforced. " The Judges of the Court of

"Appeals treated with great kindness the counsel for the respec-
"tive parties, and listened to them with a patience which could
"only have been sustained by a desire to understand, and
"rightly interpret the statute in question, and correctly settle
"the rights of the parties litigant under it;" the argument lasting several days, and running through nearly a whole week.

All hopes having thus failed to procure a modification or reversal of the previous decisions of the courts of the State of New York, another effort was made to procure an enabling act in accordance with the above suggestion, made by Judge Grover. Accordingly, Senator Minier, on the 16th of February, 1870, asked and obtained leave to introduce a bill entitled,

"An act to amend the act, entitled, *An act to authorize any*
"*town in the County of Cayuga, to borrow money for aiding in*
"*the construction of a railroad or railroads from Lake Ontario*
"*to the New York & Erie or Cayuga & Susquehanna Rail-*
"*road, passed April* 16, 1852,"

and which was read the first time, and by unanimous consent was also read the second time, and referred to the committee on railroads.

Senate Journal of the State of New York, for 1870,
page 196.

This effort, like the other, was a failure. The Legislature of the State of New York refused to pass any enabling act in favor of the bond holders.

[If the bond holders were entitled to any relief, equitable or otherwise, would the Legislature have refused to grant it, after the above suggestion from one of the Judges of the Court of Appeals? The conclusion is inevitable.]

Both of the proposed acts were alike, the one introduced by Mr. Minier being a copy of the one introduced some six years before by Senator Munger. Dates are important to a right understanding of the facts.

The first decisions in the Court of Appeals were in September, 1861.

The first enabling act was introduced in the Senate in 1864.

The latter decisions were made in March, 1867.

The second enabling act was introduced into the Senate in 1870.

The plaintiff below, became the owner of these bonds on the first day of August, 1867, as he avers in his complaint.

See Record, page 20.

Slocum Howland, Esq., of Cayuga county, was the owner of all the bonds now in suit, except bonds No's 1, 2, 3, 4 and 5, in September, 1867.

See Record, page 44, folio 54.

With the failure of this last and second effort to obtain the passage of an enabling act, the case of the bond holders became hopeless. Defeat was staring them in the face, their last card was played, their last straw gone, and in anguish and despair, they placed their bonds in the hands of non-residents of the State, and turned to this court for relief against the decisions of their own courts, and the enactments of their own Legislature. In the language of Senator Tracy, in Hatch vs. Mann, (15 Wendell, 48,) counsel will "not for a moment doubt," what the result will be — while he calls to remembrance "the great men, "by whom the principles for which he contends were estab- "lished, and bears in mind that the stations which they once "occupied, are now filled with men not less zealous for the "right, and whose talents and virtue will hereafter deserve "and receive equal veneration and respect."—8 Cowan, 404.

"The Mexican Colonization Law, of August 18, 1824, "though general to the Republic of Mexico, was, so far as it "affected lands within the limits of Texas, after the indepen- "dence of that country, a local law of the new State, as much "so as if it had originated in her Legislature. The interpre- "tation, therefore, placed on it by the highest court of the "State, must be accepted as the true interpretation, so far as "it applies to titles to land in that State, whatever may be the "opinion of this court, of its original soundness. If in courts "of other States, carved out of territory since acquired from "Mexico, a different interpretation has been adopted, the

"courts of the United States *will follow the different* ruling, "so far as it affects titles in those States."

"The interpretation within the jurisdiction of a State, of a "local law, becomes a part of that law, as much so as if incor- "porated in the body of it by the Legislature. If different "interpretations are given in different States to a similar law, "that law in fact becomes, so far as it is a rule of action by "this court, a different law in one State from what it is in the "others."

4 Wallace, 196, Christy vs. Pridgeon.
2 Black's U. S. R. 559, Leffengwell vs. Warren.

II.

ASSIGNMENT OF ERRORS.

As many of the errors assigned relate substantially to the same question, being, for the sake of safety and precaution, presented in different ways, the Court will, perhaps, better understand those questions by stating (as a general thing) all the alleged errors together, as well those which, it is claimed, occurred during the opening evidence on the part of the plaintiff below, and those which occurred after he had rested his case. There will be a few exceptions to this course.

1. The first assignment of errors arises on the offer of the plaintiff's counsel below, to prove that the signatures of Calvin King, Jonas Wood and Isaac Smith, to the several bonds in suit, were genuine, and that said King was elected Supervisor, and said Wood and Smith Railroad Commissioners, on the first day of March, eighteen hundred and fifty-three, and is stated in the Record, at page 39, as follows:

"The said plaintiff then produced the said ten several alleged "bonds and coupons and clerk's certificate, mentioned and "referred to in the complaint in this cause, and offered to prove "that the signatures to the same were genuine, and that the "said Calvin King was elected Supervisor, and the said Jonas "Wood and Isaac Smith Railroad Commissioners, on the first "day of March, eighteen hundred and fifty-three; that being "the day appointed by law for holding the town meetings, for

"the election of town officers, in that year; and to the prov
"ing of which, the counsel for said defendant made, severally
"and separately, the same objections which he made to the
"reading of said several bonds and coupons, in evidence, as is
"hereinafter stated and set forth, and which said several objec-
"tions his Honor, the Judge, severally and separately over-
"ruled; and to which said several and separate rulings, the
"counsel for said defendant, then and there, severally and
"separately, excepted, and the same were, then and there, sev-
"erally and separately noted."

The above objection arises on the 10th and last section of the act, and presents, among others, this question: In what towns were Railroad Commissioners to be elected; in every town in the county, or only in towns borrowing money?

2. The second assignment of errors or objection, arises on the admission, in evidence, of the certificate of the Clerk of Cayuga County, and is as follows: "The counsel for said plain-
"tiff then offered to read the said certificate of the Clerk in
"evidence, which certificate, under the hand of said Clerk,
"[but not under his official seal,] was endorsed on each of said
"bonds, and to which the counsel for said defendant then and
"there objected, because there was no statute or rule of law
"of said State, authorizing or empowering the Clerk to make
"any such certificate." The objection was overruled, exception taken, and the certificate read in evidence.

See Record, page 39.

"The statute did not authorize the giving of any such cer-
"tificate." Selden, Judge, in the Court of Appeals.

23 N. Y. R., page 461, Gould vs. the Town of Sterling.
1 vol. R. Statutes of New York, 1 Ed. 377, §65.
2 vol. R. Statutes of New York, 1 Ed. 403, §59.

3. The third error ruled upon, and hereby assigned as such, was in permitting the plaintiff's counsel to read the assents, so called, in evidence, without "first proving that the signatures
"to the assents were the genuine signatures of those whose
"names purport to be signed to the same."

See Record or Error Book, page 40, folio 42.

This was one of the points and questions passed upon in the courts of the State of New York, and which was attempted to be remedied by the several proposed enabling acts, above referred to.

23 New York Reports 439, Starin vs. the Town of Genoa.
23 New York Reports 456, Gould vs. the Town of Sterling.
24 New York Reports 114, The People vs. Mead.
36 New York Reports 224, same case.

4. The fourth assignment of error arises on the objection to the reading of the affidavit of Luke H. Mills and William Jones in evidence, and is stated on pages 40 and 41 of the Record, folio 42, as follows, viz:

"The counsel for said defendant, also, in due time, objected "to the reading of said affidavit, in evidence, on the ground "that the same was not legitimate proof in the cause, and also, "because the word 'filed' was not in said affidavit, the said "affidavit not averring that the assents thereto attached and "'filed' as aforesaid, comprise two-thirds of the resident tax-pay-"ers of said town, as appeared on any assessment roll of said "town, as required by said statute; but his Honor, the Judge, "overruled said objection, and to which ruling and decision, the "counsel for said defendant, then and there, excepted, and the "same was then and there noted by the said Court." This objection was never raised and passed upon in the State Courts.

The affidavit refers to "the *several* foregoing written assents, "&c."

A reference to the last portion of the first section of the statute in question, shows that this affidavit is not in compliance with the provisions of this statute, for the reason stated in the objection, and assigned as cause of error in the Record.

The statute contemplated and intended that the written assents should be obtained and filed, and then that an affidavit should be made, which should state that the persons whose written assents are thereto attached and "*filed as aforesaid*," comprise, &c.

It will be seen that the word "*filed*," is entirely omitted in the affidavit.

Suppose there never had been any assents "*filed*" at all — could the parties to the affidavit described in this complaint, have been convicted of perjury? The great difficulty, both in the State courts and before Legislative committees, has been in relation to these affidavits, *and the proving of the assents.*

Let us again suppose a case, for the purpose of illustrating the principle contended for. That the tax-payers refused to sign, and the suggestion is made, attach signatures to the assents, make the affidavit, leaving out the word "filed," then tear off the attached signatures, and then file the affidavit with the few signatures which have been obtained, no matter how few the number may be, and then issue the bonds. Such an affidavit as the one produced, would justify just such a trick. Counsel will not say it was done, but counsel will say, that there *are facts* in this matter, which have caused a high-minded, intelligent and law-abiding community to resist the payment of these alleged bonds, and which have prevented Legislative committees (when those facts were known,) from reporting any enabling act for the benefit of the bond-holders. Counsel is here to argue questions of law, and not for the purpose of passing encomiums on the tax-payers of the town of Venice. *It is no encomium*, however, to say, that there *are* among those engaged in resisting the payment of these alleged bonds, men of as exalted virtue and pure and blameless lives, and as intelligent, too, as any who have ever adorned, as Judges, the State Courts, or stood on the floor of a Representative Assembly; and the energy and perseverance with which they have defended these suits, will ever be remembered as the most noble efforts of their lives, while virtue is honored and integrity respected.

5, 6, 7, 8, 9, 10, 11, 12, 13. The fifth to the thirteenth objection and assignment of errors, both inclusive, arise on objections to the reading of the several alleged bonds in question, in evidence, (see printed Record and Error Book, pages 41 and 42,) and are therein stated as follows:

5. "That the alleged bonds, having been issued under a "special statute, and that statute having pointed out and pro-

"vided the mode and manner by which the money should be "raised with which to pay them, that said statute formed a part "and portion of the alleged bonds, as much so as if the same "was incorporated in them; and that the payment of the same "must be enforced in the mode and manner pointed out by the "statute, and that this action could not be maintained."

The Judges of the State of New York never intended to adjudicate a new statute, in relation to the payment of these bonds, notwithstanding the fact that actions were commenceed upon them in the State Courts may seem to militate against the above position. Those actions were sustained *only* as a means of testing the validity of the bonds, and *not* as a means of enforcing payment of them.

The language of Judge Johnson is very explicit on this subject. "I am of opinion, therefore, that the writ" [writ of mandamus to enforce the payment of the bonds in the mode and manner pointed out by the statute,] "should be refused, and the "Relator left to his remedy, by action against the town, *until* it "has been determined whether the statute is a valid law, and "whether the bonds have been regularly and legally issued, so "as to become binding upon the town." See latter part of Judge Johnson's opinion, a copy of which is attached to these points, and marked Schedule "B."

6. "That said bonds and coupons ought not to be read in "evidence, unless it was proved that the signatures to said "alleged assents of the alleged tax-payers of said town, as "filed in said Clerk's office of Cayuga County, were genuine, "and in fact signed by the persons whose names were attached "to the same, and that the same could not be thus proved by "said affidavit."

7. "Because the said affidavit did not conform to the re- "quirements of the statute as above mentioned." To wit: as mentioned in the fourth assignment of error *supra*.

This objection is different from the fourth. *That* is against the affidavit being read in evidence. *This* is against the affidavit being used in support of the bonds, by way of proving the signatures to the alleged assents. It is intended to go

further than the sixth objection. It is intended to raise the question, that even if the signatures to the alleged assents could be proved by the affidavit (which is not admitted) the affidavit produced is defective for that or any other purpose. This point was not raised and passed upon in the State Courts.

8. "That until the genuineness of the signatures to said al- "leged assents were proved in some way other than by said "affidavit, there was no legitimate evidence that the said Cal- "vin King, Jonas Wood and Isaac Smith had any power or "authority to execute or deliver said alleged bonds, or do any- "thing under said act."

9. "That the said Calvin King, Jonas Wood and Isaac Smith "could not become the agents of said town under said act, for "the purpose of executing and delivering said alleged bonds, "prior to the obtaining and filing of the assents as required by "said act, and until after such assents had been obtained and "filed as aforesaid, and that said plaintiff was bound to prove "in some way other than by the production of said affidavit "by the Clerk of Cayuga County from the files of said office, "that the signatures to said assents were genuine and signed, "or authorized to be signed, by the persons whose names ap- "pear to be thereto attached."

10. "That the recital in said alleged bonds, or in the testatum "clause to said bonds, were not evidence that the prior condi- "tions, required by said act to the issuing of said bonds, had "been complied with; that the right power and authority of "said Calvin King, Jonas Wood and Isaac Smith to execute "said alleged bonds, could not be proved by the recitals in said "bonds, or in said testatum clause to said bonds; that under "the act in question they could not prove their own power and "authority to execute or issue the same by recitals which they "themselves should insert in the bonds, or in said attestatum "clause to the bonds, which they, themselves, should execute, "and if so, that the same were not sufficient for that purpose."

11. That "because, by the terms of the said bonds, the first "installment or payment of interest was made payable in a less "term than six months after the date of said bonds, to wit, on "the first day of July thereafter, and that, therefore, they did "not conform to the requirements and conditions of said

"act, and were, therefore, not such bonds as were authorized "by the act in question."

12. "Because that by making seven per cent. interest, paya- "ble every six months, the interest secured to be paid in and " by the same, exceeded seven per cent. per annum."

It will be perceived that several of the above objections were not raised and passed upon in the State courts.

Counsel departs so far from the course of argument, as heretofore indicated, as to call the attention of the court to the grounds on which the two last assignment of errors or objections are founded.

The statute is imperative, that the interest secured to be paid shall *not exceed* seven per cent. per annum.

The interest secured to be paid, by these alleged bonds, exceeds seven per cent. per annum. The interest required to be paid by the bonds is *seven per cent every six months*, except the first installment of interest, which is made payable 3 months and 28 days after the date of the bond.

A statement showing the difference between a loan of one thousand dollars for twenty years with interest which *shall not exceed seven per cent. per annum*, and one which requires the payment of seven per cent. interest every six months, has been prepared by a competent accountant, and is annexed to these points, marked Schedule D.

2 Cowen, R. 712, Bank of Utica vs. Wager.

We do not complain that the interest is made payable every six months. What we complain of is, that by requiring *seven per cent.* interest to be paid every six months, it exceeds seven per cent. per annum. It should have been so rated as not to exceed seven per cent. per annum. But where is the authority to make the first installment of interest payable 3 months and 28 days after the execution and delivery of the alleged bonds?

A reference to the statute of usury will tend to illustrate this question. It is as follows:

"§1. The rate of interest upon the loan or forbearance of " any money, goods, or things in action, shall continue to be

"seven dollars upon one hundred dollars, and *after that rate*, "for a greater or less sum or for a longer or *shorter term.*"—1 "vol. R. S. of the State of New York, p. 771, 1 ed

The difficulty complained of was remedied in future statutes, by providing for the payment of interest, "*at the rate of*" &c.

"Such bonds shall become due and payable at the expiration "of thirty years from their date, and shall bear interest at the "rate of seven per cent. per annum, payable semi-annually," &c. Session Laws of 1869, page 2305, and Section 4 of Chapter 907.

"A corporation is the mere creature of the law, and cannot "act at all without the law. A contract made by it, without "authority, is void, even in the hands of *bona-fide* holders, for "value. Its legal capacity to contract, *can not be enlarged by* "*estoppel.*"

"Third parties dealing with a corporation are bound to know "the law."

Applying the above principles to the present case, it is difficult to see how these alleged bonds can be sustained. If the first installment of interest could be made payable 3 months and 28 days after the date of the bonds, *why could not all the other installments of interest be made payable in like manner?* "*Falsus in uno, falsus in omnibus.*"

13. The thirteenth error arises on the objection to the reading of said alleged bonds in evidence, "unless it was proved "that they were executed and delivered for money borrowed." —Record, p. 42, folio 48. (This objection does not apply to bonds No's 1, 2, 3, 4 and 5.)

The instruments, on their face, do not show that they were given for money borrowed.

The instruments under consideration, were to be executed only for *money borrowed.* The words "negotiate, sell, transfer or exchange," are not used, or any words of *similar import.* In this particular, the act under consideration *differs*, it is believed, from *every other act* on the same subject.

The power delegated is confined to a *special* and *specific* ob-

ject. To "*borrow* money, and to execute *therefor* a bond or bonds." It is respectfully submitted that the reasoning of Judge Welles on this subject, and which was so thoroughly approved of, by the Court of Appeals, is eminently proper and correct.

The Court will not fail to see how prominent the words "borrow and borrowing" are made to stand out in the act under consideration.

§ 1. The authority conferred is to borrow money, and execute therefor, &c., during the time for which such money may be borrowed. "All moneys *borrowed* under the authority of this act."

§ 2. And such town may, &c., *instead* of *borrowing* the money, &c., raise the amount by tax, &c.

§ 4. The Board of Supervisors of the County, are hereby authorized, &c., to cause to be collected from the taxable inhabitants and property of such town *borrowing* money, as *above provided*—mark the expression—*borrowing money* as above provided, [not issuing bonds but borrowing money.] "The "Board of Supervisors" are also "authorized and required in "each of the years, succeeding the fifth year from the time "such money may be *borrowed*, &c., to cause to be levied and "collected from the taxable inhabitants and property of the "town *borrowing*."

§ 6. It shall be lawful for the tax paying electors of the town *borrowing* money, &c.

§ 8. The Supervisor of the town *borrowing money* under this act shall, &c.

§ 9. The Supervisor of the town *borrowing* money under this act, &c.

"The authority to the town officers is to execute the bonds "*for money borrowed, and for no other consideration.*"

"To make the bonds, and transfer them to the company in "payment of stock, is substantially a different thing from bor- "rowing money and giving the bonds therefor."—Mr. Justice Welles.

"*If the money was borrowed*, the Supervisor and Assessors "were authorized to execute therefor, under their official sig-

"natures, a bond or bonds, &c. It was evidently the intention "of the act, that money should be raised and paid over to aid "in the construction of a railroad, and no color is given to the "idea or the position that the credit merely, of any town, "should be given, through or by which money might be "raised." . . . . . "If it had been intended to authorize "bonds to be given for stock, there is no reason why that in- "tention should not have been declared, as was done in the law "in relation to the village of Rome, above referred to."—Judge Lott, in the Court of Appeals, 23 New York Reports, pages 454 and 455.

The language of Judge Selden, in Gould vs. The Town of Sterling, 23 N. Y., 458 to 460, is equally explicit and decided.

Bonds were therefore authorized to be executed *only* for money borrowed, and the bonds in this case appear to be executed for *a debt owing*, and are payable to no one, and no consideration expressed. See Record, page 46. The act of April 16, 1852, did not authorize the Supervisor and Assessors, or the Supervisor and Railroad Commissioners of the town of Venice, to execute any bonds for any such purpose. The bonds are therefore illegal and void. *The recitals in them, kill them.*

In order to have brought the instruments, as matter of form, within the provision of the statute, there should have been a recital in them something like this. That the Supervisor and Assessors of said town (in office when said act was passed and became a law,) having accepted of said act and obtained and filed the requisite assents, &c., and having organized, &c., and having deemed it necessary to borrow on the faith and credit of said town, &c., and A. B. having agreed to loan for the purpose aforesaid, the sum of one thousand dollars, and said Supervisor and Assessors having agreed to *borrow* the same; now, therefore, in pursuance of said act, and in consideration of said one thousand dollars *so borrowed*, &c., the said town promises to pay, &c. Although such a recital would not have been evidence of the fact, because the statute has not made it evidence (4 Hill R. 86,) yet it would not have rendered the instruments void on their face, and have shown that they

were executed and delivered for a purpose not authorized by the statute in question.

It should not be overlooked that there is *no payee* mentioned in these alleged bonds. See Record, page 46. "*Owes* and promises to pay to" *no one.*

14, 15. The fourteenth and fifteenth assignments of errors will be found at pages 43 and 44 of the Record, and are two-fold.

1st. In "the court refusing to rule and decide as requested "by defendant's counsel, that the plaintiff was not entitled to "recover on the proofs, as stated" in the Record.

2d. In "ruling and deciding, that on the facts above proved "the plaintiff was entitled to recover."

Before proceeding further to discuss the errors alleged on the part of the plaintiff below, to have been incurred during the trial of the cause, the attention of the Court is called to the several errors alleged to have been incurred in the rejection of proof offered by the defendant below, as well as the overruling of the several legal propositions submitted.

The 16th, 17th 18th and 19th assignments of errors (page 44 of the Record,) relate to one and the same subject, and can, therefore, be discussed separately and jointly. They are as follows:

16. In refusing to allow the defendant below, "to show that "the bonds in suit were originally and in the first instance de-"livered to the said Railroad Company mentioned in the plead-"ings, for stock, and not for money borrowed, except numbers "1, 2, 3, 4 and 5."

17. In refusing to allow the defendant below, "to show that "Slocum Howland, Esq., of Cayuga County, was the owner "and holder of the bonds now in suit, in eighteen hundred and "fifty-four, except bonds numbers 1, 2, 3, 4 and 5, and contin-"ued to be such owner and holder of them, until some time on "or about the first day of September, eighteen hundred and "sixty-seven."

18. "That Slocum Howland commenced an action against

"the said Town of Venice, in the Supreme Court of the State "of New York, sometime in the year eighteen hundred and "fifty-eight, on said bonds so owned by him, to recover the "interest then due and unpaid upon the same, and which suit "was discontinued after the decision of the Court of Appeals, "in the case of Starin vs. The Town of Genoa, as reported in "the 23d of New York Reports, 439."

19. In deciding "that the proofs thus offered, if admitted in "evidence, would not change the burden of proof and compel "the plaintiff (below) to prove that he was a *bona fide* holder "for value of the bonds so belonging to said Howland as afore-"said, and that under such proof and the circumstances of the "case, the mere production of said bonds by him did not prove "that fact."

The last four assignments of errors or objections embrace two legal propositions.

1. That when the defendant below, proved that the bonds were originally and in the first instance, delivered to the Railroad in payment of stock, the burden of proof was changed. Every subsequent holder is presumed to stand in the shoes of, and to occupy the same position in reference to enforcing payment, that the Railroad Company held until it is proved that there has been a *bona fide* holder of them. The same rule applies as well against Slocum Howland, as the present holder.

"The party in possession of a negotiable instrument is *prima* "*facie* the owner of it; but as soon as it is shown to have been "lost or stolen from the true owner, the presumption is "changed, and he must then show not only what consideration "he gave for it, but also that he took the paper in good faith, "and in the ordinary course of business."

Edwards on Bills and Promissory Notes, 319, and the cases there referred to.

The same rule applies where there has been a diversion or an improper delivery of a note, from the object and purpose for which it was made. In Rochester vs. Taylor, 23 Barbour, 20, Welles, Judge, says: "Here, as the *pleadings show*, was a clear

"*diversion*, which was *prima facie*, a defence to the note. It "was incumbent *upon the plaintiff*, &c., to relieve the case of "the objection that there had been a diversion."

"Proof showing that the bill sued on was illegal in its in- "ception, casts upon the holder the burden of showing that he "gave value for it."

13 Mees. & Wels. 73, Bailey vs. Bidwell, 2 do. 642, Edmond vs. Graves.
3 vol. Phillips on Evidence, Cowen & Hills, and Edwards' Notes, page 161.
Note 6, Edwards on Bills and Promissory Notes, page 310.

"Where fraud or illegality in the negotiation of commercial "paper is shown, the *law presumes a want of consideration in "the transfer*. It supposes that the original party, not being "able to sue upon the instrument himself, has handed it over "to another to sue upon it for his benefit. This presumption, "so raised by the law, must be rebutted by the holder show- "ing affirmatively, that he gave value."—New York Supreme Court Reports, vol. 4, pages 158, 159 and 160, and the cases there quoted.

"Proof of a diversion of commercial paper from the purpose "for which it was delivered by the maker, casts upon the "holder the burden of showing that *he is* or *has succeeded* to "the rights of a *bona fide* holder."

45 New York Court of Appeals, R., (6 of Hand,) 762, Farriers & Citizens National Bank vs. Noxon.

"When a defendant, sued as the maker or endorser of a ne- "gotiable note or bill, proves upon the trial that it was ob- "tained from him by fraud, or was fraudulently put in circu- "lation, the plaintiff is bound to prove that he gave value for "it when he received it."

1 Duer's Report 309, Catlin vs. Hansen.

We desire not to be misunderstood. We do not contend that if the plaintiff below holds the bonds in question, through or from a *bona-fide* holder, that the above point would be available. What we contend for, is, that the proof above offered changed the burden. That having proved the bonds improp-

erly issued, it was for the plaintiff to prove the fact that "he "was a *bona fide* holder, or had succeeded to the rights of a "*bona fide* holder," and not for the defendant to disprove it.

"If a purchaser wishes to rest his claim on the fact of being "an innocent *bona fide* purchaser, he *must deny notice*, even "though it be not charged, and he must deny *it positively*, not "evasively; he must even deny fully, and in the most precise "terms, *every circumstance* from which *notice could be inferred.*"

1 John. Chancery, R., 203, and 3 John. Chancery, R., 345, Dunning vs. Smith.

2. The bonds were dishonored when the plaintiff below received them. The interest coupons had not been paid for years. In this connection it will not be improper to look into some of the "facts and circumstances" of this case, as disclosed by the record.

Each count in the declaration or complaint on these alleged bonds, contains, it is believed, substantially the following averment (See Record, pages 20 and 21):

"And the said town of Venice paid all installments of interest "upon said bond, from time to time, as the same became due and "payable, up to and including the installment thereof which be- "came due and payable on the *first* day of July, one thousand "eight hundred *and fifty-six*, and the coupons were, from time to "time, as the same were paid, detached from said bond and can- "celled.

"And afterwards, to wit, on the *first day* of August, one thou- "sand eight hundred and *sixty-seven*, at Cedar Falls, in the "State of Iowa, he, the said plaintiff, &c., became, and has "ever since continued to be, and now is, the owner, holder "and bearer of said bond No. 15, together with the princi- "pal and interest remaining unpaid thereon, and said bond, "together with the coupons for the *unpaid interest due* "and to grow due thereon, and *thereto attached*, were thereupon "*then and there delivered to him*, the said plaintiff, and the same "have ever since continued and remained, and still remain, in "his possession, as such owner, holder and bearer thereof; and "he, the said plaintiff, thereby became and was, and still is, en- "titled to demand, have and receive all the monies *then due* and

"*remaining unpaid* thereon, and also all monies which should "thereafter become due and payable thereon or by virtue thereof, "when and as the same should thereafter become due and paya- "ble according to the terms and conditions thereof.

"And the said plaintiff avers that there is now actually due "and payable from the said town of Venice to him, the said "plaintiff, the sum of three thousand dollars; being the principal "and interest monies which have accrued thereon *from the said* "*first day of July*, one thousand eight hundred *and fifty-six*, no "part thereof having ever been paid by the said the town of "Venice to any owner, holder or bearer of said bond.

"And the said plaintiff brings into Court here the coupons "*attached to said bond* for the *said* installments for interest mon- "ies which have so as aforesaid become due and payable upon "said bond, that the same may be detached from said bond and "cancelled, whereby and by reason of the said principal and "said several installments of interest monies herein, in this count "above mentioned, being and remaining due and wholly unpaid, "an action hath accrued to the said plaintiff to demand and have "of and from the said town of Venice the said sum of three "thousand dollars, being the aggregate of the said principal and "said several installments of interest *so as aforesaid* remaining "due and unpaid upon said bond No. 15, together with interest "upon said several installments from the time the same severally "became due and payable, as in this count above mentioned."

The plaintiff below brought these bonds into court, *with said unpaid coupons attached* to them, &c. Record, p. 43.

It is averred in the complaint that he purchased on the first day of August, eighteen hundred and *sixty-seven*, with unpaid interest coupons *attached to them*, which became due and payable *from* July, eighteen hundred and *fifty-six*—eleven years of dishonored interest remaining unpaid. The plaintiff also produced said dishonored coupons at the trial. See Record, page 43.

"Where a note is for the payment of money at a specified "time, with interest payable annually, the payment of interest "annually is as much a part of the agreement as the promise to "pay the principal. It is a portion of the debt; and if, when

"the note is sold to a third person, by the payee, a year's inter-
"est is past due, the note is then dishonored."

51 Barbour, N. Y. Sup. C. R. 263, Newell vs. Gregg, and the cases there referred to.

See also Chitty on Pleadings, vol. 3, page 6, for the form of a declaration on a note payable by installments.

The nineteenth assignment of errors is stated in the Record, at page 44, as follows:

The counsel for said defendant, then offered to show, "that "some of the signatures to said assents were not genuine, and "that others were duplicates, and that in point of fact, the "same never were signed by two-thirds of the resident tax-"payers of said town, as required by said act, and to which "the counsel for said plaintiff objected; and His Honor, the "Judge, after expressing great doubts on the subject, con-"cluded to, and did exclude the evidence offered, and to which "ruling and decision, the counsel for said defendant then and "there in due time and manner excepted, and the same was "then and there duly noted by said Court."

This ruling was certainly erroneous, if the plaintiff below was not a *bona fide* holder.

20. The twentieth assignment of errors will be found at pages 44 and 45 of the Record, and will be referred to hereafter.

21, 22. The twenty-first and twenty-second assignments of errors are two fold, and arise on the refusal of the Judge to charge the jury as requested by the defendants, and on an exception to what he did charge them. See Record, page 45.

1. On his refusal "to charge the jury, that on the above "proofs" (as stated in the bill of exceptions) "the plaintiff "was not entitled to recover."

2. On his charge to the jury, "that on said proof the plain-"tiff was entitled to recover."

III.

It is nearly twenty years since the Courts of the State of New York first construed the statute in ques-

18 Johnson 490 — 67. 2 Ld 453 —

tion, as now contended for, by the plaintiff in error. That construction has received the sanction of all the departments of the State government. The legislature conformed its future enactments to those decisions, by leaving out of them, or removing, the special provisions which are the subject of discussion here, and the Executive of the State approved of those enactments.

The former holders of the bonds issued under said act, acquiesced in those decisions by applications to the legislature for relief.

As a historical fact, under those subsequent enactments, the credit of towns and cities has been issued in aid of Railroads, and paid, and great and extensive public enterprises commenced, carried on and completed. It is now, however, contended on the other side, that during all those long years, the judicial, executive, legislative and financial intelligence of the State has been befogged and bewildered in a mist of ignorance and confusion, and that such subsequent legislative enactments were uncalled for and unnecessary.

The tax-payers of the town are loyal, law-abiding citizens. Year after year, they have contributed, with the other tax-payers of the State, funds with which to pay the expenses of the State Courts, and the salary of the Judges. They have done so, on the theory that they were men of learning and ability—equal to the discharge of the trusts reposed in them—men of pure minds and blameless lives; whose judgments, decisions and opinions were entitled to their confidence, respect and obedience. It is now claimed on the other side, that in *all* of these particulars, the tax-payers of the town of Venice *have been mistaken.*

If they had been willing that the town should issue these bonds, they would, when applied to by the employes of the Railroad Company, have given their assent, and would have willingly aided the town in the payment of them. They supposed they had some rights under the statute, and

that they had a right to assent or not, and that if they did not assent, the individuals named in the statute would have no power to do any of the acts mentioned in it. They so read the statute, and so believing, they refused to give their assent when applied to for that purpose. If they had not that right, it is most unfortunate that some one did not tell them in the first instance, that they had no rights under the statute; and that if they did refuse to assent, the individuals named could go on and issue the bonds, and create themselves the evidence of their right and power to issue them, by recitals which they might insert in the instruments which they themselves should issue.

They have been at great expense in asking the Courts of their own State, whether, under the statute in question, they had the right to refuse, and whether, if they did thus refuse, the individuals named had a right to go on and issue the bonds, the same as though they did assent, and whether, under such circumstances, they could bind the town, and create themselves the evidence of their right and power to issue them, by recitals which they themselves might insert in the instruments which they might issue. The Courts informed them that that was not the true construction of the statute in question. That they had some rights under it, and that if they did refuse their assent, the individuals named had "no power to do any act" whatsoever, and that the bonds and the recitals in them were both equally void.

If it is to be said now, that the State Courts were all wrong, and had no right to put any such construction upon the statute in question, then have the tax-payers of the town been most unfortunate in incurring so much expense, in obtaining information from the State Courts. It is money worse than thrown away; for it has involved the tax-payers in expensive litigations for having acted on the faith of those decisions, and believing the instruments void. If this action can be maintained, then have the tax-payers been most unfortunate in every particular—unfortunate in supposing they had any rights to assent or not—unfortunate in asking the Courts of their own State whether that was the true construction of the statute or not—unfortunate in acting according to the information obtained from their own Courts; and still more unfortunate in

being compelled to contribute towards the support of a Judiciary whose decisions it is dangerous to follow, and which has not a right to construe for them the statutes of their own State, and advise them of their rights under them.

IV.

Before going into a fuller argument and discussion of the errors above assigned, a brief statement of some of the questions, which it is supposed this Court will be called upon by the defendant in error to decide, will not only be proper, but appropriate. They are,

1st. That the Courts of the State of New York have no right to construe their own statutes, and determine what they mean.

2d. That there is no such thing as vested rights under a statute of the State of New York, as construed and established by the State Courts. That if the State Courts and the Legislature agree as to the construction of a State statute, and the Legislature refuse to change the statute to suit the wishes of interested defeated parties in the State Courts, they may place their adjudicated void claims in the hands of non-residents of the State, and they may commence actions in this Court, and that it is the duty of this Court to decide that the State Courts and the Legislature together and acting in harmony with each other, have not the power or the right to create or establish any vested rights, under and by virtue of a State statute; or in other words, that the State Courts and the Legislature, acting together, do not know what their own statute means, and have not the right or the ability and capacity so to decide. And

3d. As a corollary of the above, that it is the duty of this Court so to decide and adjudicate, as

First. To *invite* parties, when driven out of the State Courts, on the construction of a State statute, to place their obligations

in the hands of non-residents of the State, and then to try *those statutory questions over again* in the United States Court. It is believed that nothing short of some *uncontrollable necessity* will induce this Court to adopt any such rule; and that it will *labor hard* to find some reason for *sustaining* the State Courts, and not for reversing them. The harmony of the States—the respect due from one Court to another—the fact that litigation should cease somewhere, all require it. It is believed it will be done.

Second. To disregard what has heretofore been considered a great and salutary principle in the administration of justice, by creating uneasiness about the capacity if not the integrity of the State Courts, and encouraging litigation and strife, instead of respect for established usages and precedents.

It is respectfully submitted, that the principles contended for, on the other side, would tend to shake and destroy the confidence of the tax-payers in the judiciary of the State, and the legislative wisdom which has conformed itself to its decisions.

V.

THE ALLEGED BONDS ARE VOID.

1. Because the requisite assents were never obtained.

2. Because they were delivered in the first instance for stock, and not for money borrowed.

> There was no legitimate proof, that the assents of two-thirds of the resident tax-payers of said town had ever been obtained and filed, as required by said act. Such proof was, in the language of Judge Lott, in the Court of Appeals, "an absolute prerequisite and con- "dition precedent," [and not subsequent] "to the right "power and authority of the Supervisor and Assessors "of said town, to execute the bonds in question." It was a jurisdictional question, and unless done, they

had "no power to do any of the acts authorized by "said act," and the question of *bona fides* has no application to this proposition.

Assuming such proof was given, (which is not admitted) it was only *prima facie* evidence, and could be rebutted, as proposed in the nineteenth exception or assignment of errors above stated.

Admitting, for the sake of argument *only*, that such proof could not be given, as against a *bona fide* holder of said bonds, the plaintiff was not such a *bona fide* holder of them, as to exclude such proof. *Supra.*

In the argument of a cause, what is offered to be proved and excluded, must be taken as true. We then say, that for the purposes of this argument, it must be assumed as true—

That all the bonds in suit in this case, except the first five, "were delivered to the Railroad Company, for stock."

That "some of the signatures to said assents were not "genuine—that others were duplicates, and that in point of "fact, the same never were signed by two-thirds of the resi- "dent tax-payers of said town, as required by said act."

That Slocum Howland, Esq., of Cayuga County, was the owner and holder of the bonds now in suit, in 1854, [except, &c.,] and continued to be such owner of them, until some time on or about the first day of September, 1867, when he *disposed* of them, &c.

That he commenced an action in 1858, to recover the interest, &c., and which suit was subsequently discontinued, &c.

That the pleadings and proofs showed that when said bonds came into the possession of the plaintiff, there was about eleven years interest due and unpaid on them, and which was evidenced by *dishonored coupons attached to said bonds.*

We do not want to be misunderstood. We admit the second proposition relates to "*a power improperly executed*," and is *a condition subsequent*, and that the bonds, if there was no other objection to them, would be good in the hands of a *bona fide*

holder, notwithstanding the improper execution of *the power granted.*

The first proposition relates to *the power itself*, and is a "*condition precedent*," and not "*subsequent.*"

We respectfully submit, that *bona fides* has nothing to do with the question, whether "any power" existed to execute and deliver the bonds in suit, but simply with the proper execution of "a power granted."

VI.

We proceed to discuss the first proposition above stated, on the theory that the defendant in error, is a *bona fide* holder of the bonds in suit.

> There were three things, as claimed by the plaintiff in error, necessary to be done *before* "any power" existed for the execution or delivery of the bonds in suit, and *all* of those pre-requisites and conditions precedent must be proved, on the part of the plaintiff below, before he can recover.

1st. The organization of a Railroad Company, as required by the statute.

2d. Obtaining and filing the requisite assents.

3d. The making and filing of the affidavit required by statute.

The plaintiff below seemed to think, that he was bound to prove affirmatively the formation of a Railroad Company, for he produced and read in evidence a certified copy of the articles of association of said Company. See Record, page 39, folio 37.

It would be as competent for the persons named, to bond the town by certifying that a Railroad was organized, as to the existence of any other of the conditions precedent to the granting of the power. Would their certificate be evidence of that fact?

Believing that Judge Selden, in his opinion in the Court of

Appeals, in the case of Gould vs. The Town of Sterling, 23d N. Y. Reports, 464, 465, has stated these questions more clearly than counsel feels able to do, he incorporates here the following extracts from that opinion, as a part of his argument:

"Knowledge of the facts in regard to the assent of the tax-
"payers was in no manner peculiar to the Supervisor and Com-
"missioners, but was equally accessible to the parties receiving
"the bonds. The statute, of which they were bound, of
"course, to take notice, apprised them that the bonds could
"not be legally issued, until the requisite assent was obtained,
"and also that the assent, when obtained, would be placed up-
"on the files of the county. The case is not, therefore, at all
"like that of the Butchers' and Drovers' Bank, where the ex-
"trinsic fact, related to the state of the accounts of the bank
"with one of its customers, which could only be known to the
"teller and other officers of the bank. Here the parties who
"received the bonds, had the means of ascertaining, and were
"bound to inquire as to the existence of the facts upon which,
"as they knew, the validity of the bonds depended.

"The negotiability of the bonds in no manner aids the plain-
"tiff. It is true they are negotiable, and have in this respect,
"most if not all the attributes of commercial paper. But one
"who takes a negotiable promissory note or bill of exchange,
"purporting to be made by an agent, is bound to inquire as to
"the power of the agent. Where the agent is appointed and
"the power conferred, but the right to exercise the power has
"been made to depend upon the existence of facts, of which
"the agent may naturally be supposed to be in an especial
"manner cognizant, the *bona fide* holder is protected; because
"he presumed to have taken the paper, upon the faith of the
"representation of the agent, as to those facts. The mere act
"of executing the note or bill, amounts of itself, in such a
"case, to a representation by the agent to every person who
"may take the paper, that the requisite facts exist. But the
"holder has no such protection, in regard to the existence of
"the power itself. In that respect the subsequent *bona fide*
"holder is in no better situation than the payee, except in so
"far as the latter would appear of necessity to have had cog-
"nizance of facts, which the other cannot be presumed to have
"known.

"There is an obvious distinction between this case and that "of the State of Illinois vs. Delafield (8 Paige, 527). There "the State was the party to be bound, and the State had by "law appointed certain officers its agents, and conferred upon "them power to execute and negotiate its bonds. The diffi- "culty consisted in the irregular manner in which the power "was executed, not in the creation of the power itself. The "distinction is as plain as that between conditions precedent "and subsequent in general.

"It follows from these principles, that until it was shown, "that the written assent of the required number of tax-payers "had been obtained pursuant to the act, there could be no "recovery upon the bonds."

VII.

A brief reference here, to some of the cases which have been relied upon, as in conflict with the views above expressed, will not be improper, and will tend to illustrate the views contended for, on the part of the plaintiff in error.

Mercer County vs. Hacket. 1 Wallace 85.

This case presented two questions, viz:

1st. Whether, where *the power* to issue bonds *existed*, and they had been issued under *that power*, but certain "restric- "tions, limitations and conditions" had not been formally complied with, and they had been sold in a manner *different* from what they were required to be sold, and for less than par; whether they were valid in the hands of a *bona fide* holder, or not; and the Court held they were.

This is the very distinction taken by the Court of Appeals, between the Rome act and the act in question, viz: Where a

power *existed* with "restrictions, limitations and conditions," and bonds were issued *under that power*, and then improperly put in circulation, and where bonds were issued without "any "power," and put in circulation.

Gilpeck et al., The City of Dubuque. 1 Wallace 175.

Two of the head notes in this case are as follows:

1st. "By a *series* of decisions of the Supreme Court of "Iowa, prior to that of A. D. 1859, in the State of Iowa *ex* "*relatione*, vs. the City of Walpells, (13 Iowa 383,) the *right* "of the Legislature of that State to authorize municipal cor- "porations to subscribe to Railroads extending *beyond* the lim- "its of the city or county, and to issue bonds accordingly, "was settled in favor of the right, and those decisions meet- "ing with the approbation of this Court, and being in har- "mony with the adjudications of sixteen States of the Union, "will be regarded as a true interpretation of the constitution "and laws of the State, so far as relates to bonds issued and "put in the market during the time that those decisions were "in force. The fact that the Supreme Court of Iowa now "holds that those decisions were erroneous and ought not to "have been made; and that the Legislature of the State had "no such power as former Courts decided that they had, can "have no effect upon transactions in the past, however it may "affect *those in the future.*

"2d. Although it is the practice of this Court to follow the "latest settled adjudications of the State Courts, giving con- "struction of the laws and constitution of their own States, "it will not necessarily follow decisions which prove but *oscil-* "*lations* in the course of such judicial settlement. Nor will "it follow any adjudication to such an extent, as to make a "sacrifice of truth, justice and law."

It is not supposed that it will be contended that the labored and well considered opinions of the Court of Appeals, in the cases above referred to, are such a "sacrifice *of truth, justice*

and law," as that they ought not, for that reason, to receive the respectful consideration of this Court, notwithstanding the ground may be assumed by the counsel on the other side, that they are *not competent* to construe the statute of the State, and decide what *they mean*.

Rogers vs. Burlington. 3 Wallace, 654.

Two of the head notes in this case are as follows:

"2d. Power to borrow money for *any* public purpose, gives "authority to a municipal corporation to borrow money to aid "a Railroad Company, making its road as a way for public "travel and transportation; and as a *means* of borrowing "money to accomplish this object, such municipal corporation "may issue its bonds, to be sold by the Railway Company to "raise the money.

"3d. *Power* to issue the bonds *being shown*, the municipal "corporation, as against *bona fide* holders of them for value, "is estopped to deny that *the power* was *properly* executed."

There is nothing in the above case in conflict with the decisions of the Court of Appeals, but rather the reverse. One question was, what was meant by "any *public purpose?*" Was a Railroad a public purpose, or was it a private one? In holding it a public purpose, the Court *approved of* the doctrine of our State Courts, which had long before decided that a Railroad Company might take the real estate of a citizen, over which to build its track, because it was for a public purpose. Mr. Justice Clifford, it is believed, calls them somewhere, a kind of improved highway.

The other head note is in accordance with the decision of our State Courts in the Rome case, and not in conflict with the decision of the Court of Appeals in reference to the statute in question. It is this: where *the power* to issue bonds *is shown*, &c., as against a *bona fide* holder of them for value, the municipal corporation is estopped from denying that *the power* was *properly executed*. The difference is between *a power improperly executed*, and *no power at all*.

It does seem as though the distinction could not be overlooked by the counsel for the defendant in error.

Supervisors vs. Schenck, 5 Wallace, 772.

The real point of this case was one of INFORMALITY, and not of *power*.

A statute had been passed in the State of Illinois, in 1849, authorizing the "County Court" of counties wishing to subscribe to stock, to subscribe, &c., and to order an election. In 1851, an act was passed, by which it was declared, among other things, that the power of the "County as a body politic, "can only be exercised by the Board of Supervisors thereof," &c.

At page 779, the Judge, delivering the opinion, uses the following language: "Power in the County Court, therefore, to "make the subscription, purchase the shares, and issue the "bonds in this case, *if* the proceedings were regular, is placed "beyond all question."

Again, at page 784, the Judge says: "Where a corporation "has power, under *any* circumstances, to issue negotiable se- "curities, the decision of this Court is, that a *bona fide* holder "has a right to presume that they were issued under the cir- "cumstances which give the requisite authority, and they are "no more liable to be impeached for any *infirmity* [that is "the word used, 'infirmity,'] in the hands of such a holder, "than any other commercial paper."

What the plaintiff in error now claims is, that according to the *true construction of the statute in question*, the Supervisors and Commissioners had no authority to issue these bonds, under *any circumstances*, until, &c., and that those conditions precedent remain unproved.

We do not attack them for "*infirmities*," but for *non-existence. They never existed, to be* "*infirm.*"

Mr. Justice Clifford, in the case of St. Joseph Township vs. Rogers, 16 Wallace 644, at page 659, reasons on the assumption that a power existed. "Such a power is frequently con-"ferred, to be exercised in a special manner, subject to certain "regulations, conditions or qualifications," &c.

The case now before the Court, does not present the question, whether there had been an antecedent compliance with "regulations, conditions or qualifications," except in one aspect of it—"borrowing money." The other question, *the power* to do any act whatsoever, *lies back of all those questions.* Nor do the recitals in the bonds show a compliance with that regulation, &c., for the recitals in the bonds are that they were given for a debt or demand owing, and not "for money borrowed."

That the question in the case of Mercer County vs. Hackett, 1 Wallace 87, was *not* whether *any* power existed, but in reference to the *exercise* of a power *which was granted*, with certain "restrictions, limitations and conditions," is quite evident from the following extract from the argument of one of the counsel, Mr. Loomis, for the bond holder:

"All the elegance of the engraver's art, all the plighted "faith, credit and property of modern finance, all the strength "and assurances of language, have been used to allure the "purchaser. . . . . It had that effect, and the paper passed "readily into the hands of a confiding holder in the distant "State of New Hampshire, as a safe and secure investment. "How *can* the county now, with the proceeds of the bond in "its treasury, and with the riches which the railway will bring "to its people in enjoyment, set up the defence it does, and "proclaim to the nations, 'Base is the slave who pays?'"

There is no spread eagle on the bonds in question in this suit. "The engraver's art" is wanting. There is no "railway in "enjoyment" or expectancy. But "they say so," and is not that as good as a *spread eagle*, or a "railway in enjoyment?" Look at the testatum clause! The question before this Court is not one of "spread eagles," of "railways in enjoyment," or of "say so's," but what does the statute require as a condition

precedent to the power to do any act, as well as conditions subsequent—and what did the Court of Appeals of the State of New York decide, and on what questions did it pass.

VIII.

Should this Court think proper to re-examine the questions which were so fully and ably argued in the Court of Appeals of the State of New York, by counsel for the bond holders, which were subsequently decided by that Court, it is respectfully submitted that no reported case will be found where a judgment has been rendered against a country town, except under the following circumstances, viz :

1. Where certain *powers* were *in fact* conferred by the statute *itself*, on certain individuals, and they were *by the statute* authorized to exercise those powers, with certain restrictions, limitations and conditions ; or

2. Where acts had been done by individuals, acting under such a power, but not in accordance with the restrictions, limitations and conditions mentioned in the statute, and the rights of the parties turned on the question of *bona fides.*

No reported case will be found in any book, where it has been decided, where a statute *merely designated*, as this does, certain individuals, whom certain other individuals, if they thought proper to do so, *might appoint agents*, or confer certain powers on them to act for a third party — a country town for instance — and designating how and in what way they might thus be appointed, or have such powers conferred upon them, that such agency existed, or such power had been conferred, without its being shown that that second party had conferred that power on the first named individuals, to act for the third party. To say that a certificate or recital of those who had *the capacity* to be appointed agents, was evidence that the

second party had appointed them such agents for that third party, and that, too, in the way and manner in which that second party had the power to appoint them agents for the third party, it is submitted, is an absurdity. If that is so, the second party need not do anything; and that is just this case. The tax-payers refused to make the appointment, or confer the power; and now it is claimed that those whom the *second* party had the power *to appoint*, but did not, can bind a *third party*, by simply saying or certifying that the second party had authorized them thus to bind the third party, when the party had, in fact, done no such thing.

Every person of full age, and of sound mind and memory, has a right to do for himself, just what these tax-payers had a right to do for the town: authorize some one to act as his agent, and to sign notes for him. Suppose a note is produced, signed John Doe, by Richard Roe, his agent and attorney; would a certificate attached to it, by way of a testatum clause, or a recital in the body of it, by Roe, that he had been authorized by Doe to give such a note for him, bind him, or must *the power be proved.*

There is nothing peculiar about authorizing the tax-payers to make this appointment, and to confer this power on certain individuals to act for the town. It might as well have designated the Governor, giving the appointment to him; and pointing out the individuals whom he might appoint, and the way in which he should confer the power; as, for instance, by an instrument in writing, under his hand and the privy seal of the State, and filed in the office of the Secretary of State; and that unless that was obtained from the Governor, and filed as aforesaid, the individuals named should have "no power to do any "of the acts" specified. Would not some action on the part of the Governor be necessary to confer the power? Or suppose the Governor, when applied to, refused, as these tax-payers did, to confer the power, or to sign or file any such instrument; could the persons named go on and issue the bonds, and bind the town, by reciting or "saying so" in the testatum clause, that the Governor had made such an appointment, and conferred such a power?

Every reported case, where an action has been sustained,

will be found to be where an apparent authority at least existed, and the act done was in the line of that apparent authority, and not where there was "no authority" whatsoever. These assumed actors had no authority to do any act whatsoever—how then could they do an act which would evidence their authority?

Their authority did not depend on their own action, but on an appointment to be obtained from a third party, which was never obtained. Would it do for any one eligible to the office of Sheriff, Comptroller, Justice of the Supreme Court, Judge of the Court of Appeals, to thrust himself forward, and to act in the capacity named, for the county, district or State, before obtaining any appointment or power to act, simply because they had the capacity to be appointed; and then as against third parties thrust forward their certificates, "say so's" and recitals in testatum clauses as evidence of authority. Would the county or State be bound by their acts, and would their certificates, recitals and "say so's" by way of testatum clauses, be evidence of their power and right to act, as well as an estoppel against *the municipalities named?* Yet this is precisely this case. Those persons named, simply because they were declared *eligible to be* appointed to act for the town, went on and acted, without having obtained any authority to do any act whatsoever, and yet their "say so's" are thrust forward as evidence of the existence of a power authorizing them to "say so."

It is not deemed necessary to refer to the claim, that these unauthorized persons, without any power to do any act whatsoever, subscribed for stock in a defunct railroad. What there was of that, and all there was of it, appeared and was disposed of in the cases in the Court of Appeals.

Who is the alleged principal, and who the agent in the case now before the Court. Are these unauthorized persons, or the towns, the principal; yet everything which has been done, has been done by individuals, whom the statute in question says, shall have "no power to do any act whatsoever." They are not the principal, or the parties to the alleged contract; then how could they make or affirm a contract, against a third party, the town, acting as they did *without* "any power" to do any act whatsoever, for the town?

IX.

The principles contended for by the plaintiff in error, are in accordance with well established precedents and acknowledged authority, and the well considered opinions, delivered in the Court of Appeals, in the State of New York, are not "oscillations," or a "*sacrifice of truth, justice and law.*"

> The Court of Appeals in coming to the conclusion which it did in the cases above referred to, adopted no *new rule* of construction. The courts of the State of New York, from the time when the State was organized down to the present time, have uniformly held that when instruments were executed under a *power*, (in this case no power existed,) and executed in good faith, and both parties (the maker and receiver) believed that they were within the power, yet if, when brought to a judicial test, they were found not to be within the power, they were void, whether in the hands of a *bona fide* holder or not.

In Batty vs. Caswell, 2 John R. 48, decided in 1806, Livingston, Judge, says, "This was a *special* power, and ought to "have been strictly pursued, and the note was made without "authority. His (the defendant's) confession after the suit "was commenced, does not alter the case."

See also the remarks of Chief Justice Savage at page 498 in 8 Wendell, and the cases referred to by Sutherland, Judge, in Hanford vs. McNair, 9 Wendell 56.

In 1818, Chancellor Kent said, (3 John. C. R., pages 344 & 345 :)

"A special authority must be strictly pursued, and every "purchaser is to be presumed to know that *special authority*

"as in this case, for it *is contained in the act ;* and if he purchases in a case in which that special authority *was not pursued*, "*he purchases at his peril.*"

Again in 1843, in Sharp vs. Speir, (4 Hill 86,) Bronson, Judge, says, "Every statute authority must be strictly pur- "sued. The recitals in the conveyance are not evidence against "the owners of the property, but the facts recited *must* be "established by proofs *aliunde*. As the *statute* has not made "the conveyance *prima facie* evidence of the regularity of the "proceeding, the fact that they were regular must be proved, "and the *onus* rests on the purchaser. He must show, step "by step, that *every* thing has been done which the statute "makes essential to the due execution of *the power*. It mat- "ters not that it may be difficult."

The whole of the very able opinion of Judge Comstock in the case of the Mechanics Bank vs. the New York & New Haven Railroad (3 Kernan 599, 13 New York R.) is applicable to this case, and perfectly conclusive against the rights of the plaintiff to recover, if what is there advanced and decided is law.

Where all is so appropriate, it is difficult to select, but at page 612, Comstock, Judge, says, "Schuyler, as the agent of "the Company, had no power to issue a certificate for shares "of stocks, except *upon the conditions precedent* of a transfer "on the books," &c. And at page 632, it is stated, "*Underly-* "*ing* the whole subject, there is *this fundamental proposition*, "that a principal is bound *only* by the *authorized acts* of his "agent." And then again, at page 231 he says: "It is obvious, "upon a moment's reflection, that *negotiability* can impart *no* "vitality to an instrument *executed under a power*, where the "agent has exceeded his actual or presumptive authority. "Whoever proposes to deal with a security of *any kind*, ap- "pearing on its face to be given by one man for another, is "bound to enquire whether it has been given by due authority, "and if he omits that enquiry, he deals at his peril." Such, too, are the views expressed by Judge Denio, in the Bank of Kent vs. Butchers & Drovers' Bank, 14 N. Y. R. 626, &c. In the case now before the Court, the conditions precedent were

contained in the act itself, and everybody was bound to take notice of them, for they were *a part of the statute itself.* 3 John. C. R. 344 and 5, Dunning vs. Smith, 19 N. Y. R., Bank of Rome vs. Village of Rome, page 24.

Those were cases, too, where an agency existed—where a power was to be pursued--where an instrument was to be executed under a power. How eminently correct, then, was *the construction* put upon the *statute in question* by the Court of Appeals; where there was no agency—no power—"shall "have *no power*, to do *any* of the acts," &c.

The case in 31 New York, was not whether an agency existed, *but what representations by an acknowledged agent* on the sale of a note, would bind the principal. See page 619. The case of Crouse vs. Hunter, 28 N. Y. 386, was of the same character, and the case 40 Barbour, 356, related to the liability of a principal, growing out of the representations of a known and acknowledged agent. None of them relate to the question whether an agency existed or not.

The case in 1 Comstock, 433, the Farmers' Loan and Trust Co. vs. Walworth, is equally decisive of the question. The two first head notes to that case are as follows:

"When money deposited in the Court of Chancery, in a suit "for the partition of lands, has been invested by the clerk "upon bond and mortgage, *executed to him* in his official char- "acter, such clerk has no power to discharge the mortgage, "without the order of the Court.

"And it seems, that where the clerk executes such a dis- "charge, without actual payment, and without the order of "the Court, it is void as against *bona fide* purchasers of the "property incumbered by the mortgage."

What is there said about ratification, has no application to a municipal corporation.

"Ratification is inoperative if the party" (speaking of a municipal corporation) "attempted to be charged, was not com- "petent to make the contract in question, when the same was "made, nor when the supposed acts of ratification were per-

"formed, or if the contract was illegal, immoral or against "public policy."

5 Wallace, 781. Supervisors vs. Schenck. *Super.*

It requires a legislative act, as much to ratify or legalize, or to apply the doctrine of estoppel to instruments issued without authority, purporting to bind a municipal corporation, as it does in the first instance to authorize the issuing of them. In the case in 1 Comstock, there were natural persons who could ratify and legalize, as they thought proper. "*The "town has no power to recognize these bonds, or in any manner "to raise money to pay them.*" Grover, Judge, 36 N. Y. 230.

The case of the Farmers' and Mechanics' Bank of Kent County vs. the Butchers' and Drovers' Bank (16 N. Y. R., 125) is in accordance with the principle here contended for.

In this case the Teller had the right to make the certificate. Like the right of one partner to sign the name of the firm, the *power* existed. The marginal note recognizes the distinction, in the expression, "whose *power* to certify is limited," &c.

In the case under consideration, the power was not limited, for *no power existed.* It was expressly provided that the Supervisor and Commissoners, *shall have no power to do any* of the acts authorized by the act, until said assent should be obtained and filed, as required by the statute. Having obtained this power, then their authority was limited to borrowing money, &c. Having obtained the power, then perhaps the acts done "*beyond*" that, might have some resemblance to the case in the 16th of New York Reports, but not before.

Why would not a certificate, made by a messenger, or by the porter or house-cleaner of a Bank, bind it? Because they have *no power* to certify *at all*, and hence their certificates would be bad, whether in the hands of a *bona fide* holder or not. It is *only* where the *power to make exists*, and then there is a negotiation of the instrument *made under that power*, that the question of negotiability and of *bona fide* holddership arises.

In the case in 16 N. Y. R., above referred to, Judge Selden, with his usual clearness and precision, proceeds to es-

tablish *first* the power of the teller to certify, before he undertakes to reason about negotiability. Thus at page 130, he says: "In the case of Mussey vs. Eagle Bank [9 Met. 306] "the Supreme Court of Massachusetts held not only that such "a teller had no original inherent power to certify checks, but "that a general custom to that effect among banks would con- "flict with the public interest and would be bad. *I am not*" [he says] "*entirely* satisfied *with the reasoning* of the Court in "that case. The act of certifying a check is *simply* answering "the supposed inquiry of one about to take the check, whether "the bank has funds of the drawer to meet it, and no other "officer or agent of the bank would seem to be so competent "to give the answer as the paying teller." He then proceeds with his argument through the whole of that page, and a considerable portion of the next, to establish and illustrate the *power* of the teller to certify, by arguments drawn from his position and relation to the Bank, and then adds: "But it is unnecessary in the present case to decide" [in that way] "this question" [of power.] "as it appears not only that the teller Peck was in the habit of certifying the checks of customers with the knowledge of the officers of the bank, but that he was furnished with a book for the express purpose of keeping a memorandum of such checks. His *authority*" [power] "to certify, therefore, in a proper case, cannot be disputed." Having thus established the authority, the power, he next proceeds with the question of negotiability, and in the process of that reasoning, he adds, at page 135, "It is, I think, a sound rule, "that where the party dealing with an agent has ascertained "that the acts of the agent correspond in *every particular*, &c., "with the terms of the *power*, he may take the representation "of the agent as to any *extrinsic* fact which rests peculiarly "within the knowledge of the agent, and which cannot be as- "certained by a comparison of *the power*, with the acts done "*under* it." Does any one suppose, if the Teller had had no power or authority to certify, that Judge Seldon would have held the Bank liable, *simply* because the check was made negotiable? In the case of Mussey vs. Eagle Bank, 9 Metcalf, 306, the plaintiff was defeated upon the *sole* ground that the Teller had *no authority* to certify, and not on the ground of non-negotiability. The opinion proceeds upon the ground that if the

power had existed, the bank would have been bound by the certified check in the hands of a *bona fide* holder, even if the certificate had been false.

The case of The State of Illinois vs. Delafield, referred to by Judge Selden at page 137, was also a question of negotiation, and not of power to make. "An agent of that State was au-"thorized," [he says] "to DISPOSE of certain bonds," [bonds rightfully and properly made] "but was not to *sell* them below "par or on credit."

The case of the North River Bank vs. Aymor [3 Hill 262] was also a case of negotiation, where the power to make existed, and Judge Cowan in his opinion, recognizes the doctrine here contended for, for at page 272 he adopts the language of Chief Justice Best in the case of Whittington vs. Herring, and says all that was necessary for the plaintiff to enquire for, was *the authority*.

Did the authority, the power to make, exist in the case under consideration before a Railroad Company was formed? If it did not, did it exist before the assents of two-thirds, &c., were obtained and filed, as required by the statute? Suppose there had never been any Railroad formed, and no assents ever obtained and filed, would these instruments be valid?

The only question for those to pass upon who made the affidavit was one of computation, and not of genuineness of signatures. See Judge Lott, in the case of Starin vs. The Town of Genoa, 23 N. Y., 451. See also Selden, Judge, 464. These alleged bonds, if they ever had an inception, had that inception in the State of New York, and by virtue of a statute of the State of New York, and not elsewhere, and the statutes of that State and the decisions of its Courts are alone applicable to the present case.

X.

The certificate of the Clerk of Cayuga county was endorsed on each and every bond. That of itself was sufficient to put the purchaser on enquiry, and to pre-

vent any one from becoming a *bona fide* holder of them. See Record, page 39.

> Although the County Clerk was not authorized by law to make any such certificate as the one endorsed on these bonds, yet it is *significant* of *the fact*,—viz: that the assents filed, *only* "*purported*" to be the assents of, &c. It may be that the Clerk thought proper to do what the purchaser of these alleged bonds might have done, and which the Judges of the Court of Appeals say they ought to have done, look at the assessment rolls of the Towns, in the County Treasurer's office, and hence the qualified manner in which he certified, "*purporting to be*," &c. It is respectfully submitted, that for these reasons *alone*, the Circuit Court erred in rejecting the proof offered on the part of the defendant below.

XI.

The instruments offered in evidence were *not bonds*, but simple parol contracts. They are not *specialties*, and the recitals and statements contained in them, (whatever they are) have none of the sanctions of those contained in a deed or sealed instrument. They are not bonds within the provisions of the statute under which they are claimed to have been issued, and the plaintiff below was not entitled to recover on them *as on bonds*, or otherwise.

XII.

Before closing the argument on the part of the plaintiff in error, it will not be improper to meet and

expose some of the positions so often taken in the State Courts, in favor of a recovery on the bonds so called.

> *First.* That the Supervisor and Commissioners under the statute in question, (which says they shall have *no power* to do *any* of the acts, &c.,) can create their own authority by their own certificate. If the doctrine was correct, the recitals are defective. They do not state facts sufficient to show that the provisions of the statute were complied with.

If they could *not* issue bonds, they could *not* issue certificates. If they had no power to make the one, they had no power to make the other. Back of all, lies the great question whether they had authority to do "*any act* whatsoever."

The testatum clause does not state what class of the tax-payers assented, or whether their names appear on any assessment roll; nor does it state *when* or by *whom* the assents were obtained or filed. It does not state to what the tax-payers assented, whether it was to the building of a school house, or the borrowing of money to loan to a railroad, or if to a railroad, *what one*, or whether it was a railroad passing *through the city of Auburn* or not.

The testatum clause says nothing about *the affidavit*, which was as much a condition precedent as *the assents*. The assents were good for nothing without the affidavit, nor the affidavit without the assents. No power existed until *both* were obtained and filed, and a railroad organized as required by the statute.

So far as appears in this case, all that was ever done was the formation of a railroad company; for the offer and objection admit, for the purposes of this argument, that the requisite assents were never obtained or filed; and the proof shows that the affidavit was defective. Is proof of one fact, the formation of a railroad company, sufficient to uphold the bonds, and to show a power under the statute?

Here are individuals without power to do *any* thing; their

acts are void, yet their "*say so*" is omnipotent. If they had no power to act, where did they get the power to "say so?"

In this case, there has never been any enabling or legalizing acts passed, designating by whom or how these bonds might be ratified, or how and in what way they might be legalized. True, an attempt was made in 1864 and 1870, indirectly, to legalize them, by amending the act in question, but the efforts failed. The alleged bonds remain as the Court of Appeals left them—illegal instruments—instruments issued in *violation of the statute*, which says they should *not be issued* unless such and such things were done, and which it is admitted, by the offer and objection, *were never done.*

Second. That the defendant is estopped. It is generally supposed that a plaintiff must make out his case, before the defendant is estopped from any thing.

No one authorized to issue the bonds. No one authorized to ratify them. No enabling, or legalizing acts ever passed in reference to them, and no one authorized to do any estoppel act in reference to them, and yet somebody is estopped.

This doctrine of estoppel, in a case like the present, is based on the demoralizing doctrine that *rights can be acquired by violating law.* Go on—issue the bonds *without authority*, and in express violation of the statute which says: "Shall have *no* power to do *any* act," and then get some other unauthorized persons to do some other unauthorized acts, the more the better, and then ask the Court to apply the doctrine of estoppel and hold them good.

To such a proposition, the language of an English Judge, of great eminence, might well be applied, when he said, he "hoped "it would be the last time he should ever hear it argued, that "an Englishman could acquire English rights in an English "Court, by the violation of English law." Yet that would be the doctrine of estoppel, applied to a case like the present.

Rights acquired under statutes violated and not performed!

What a motto. "Rights acquired by violating law." Not exactly that either, but, "rights acquired by *many* violations of law."

It would seem, from some of the many arguments which have been used during the progress of the many tedious and protracted litigations in the State Courts, to collect the alleged bonds, (under the act of 1852,) as though some individuals thought it was the duty of every one having funds to invest, to purchase, *without enquiry*, such securities, instead of investing their money in some *legitimate business*, and that *then* it was the duty of Judges, to turn collecting attorneys for the bond holders, instead of upholding the requirements of statutes, and the sanctity of law.

The Court of Appeals adopted no such limited views. It settled all those questions of "ratification," of "estoppel," and of "say so," in the State Courts against the bond holders, and sustained and upheld the requirements and provisions of the statute in question, thereby deciding that the bonds could not be thus upheld; and that decision has become the recognized law of the State of New York, and a part of the text of the statute in question, as much so as if incorporated into the statute itself, and forming a distinct section of it.

XIII.

By the laws of the State of New York, this defendant is not such a corporation as will subject it to litigation in a United States Court. This Court has no jurisdiction over the town of Venice. See the views expressed by Judge Lott in 23 N. Y., 446 & 447, Starin vs. Town of Genoa.

> The twentieth assignment of errors will be found at page 44 45, and is as follows: "The counsel for said "defendant, then referred to the general statutes of "the State of New York, under and by virtue of "which it was claimed that the said town of Venice "was incorporated, and contended and insisted that "the said town was not such a corporation as made it a "citizen of the State of New York, but was a part and

"portion of the machinery of the State government "and not a citizen of this State, and that this Court "had no jurisdiction over it, or in this matter; but his "Honor, the Judge, decided otherwise, and to which "ruling and decision of his Honor, the Judge, the coun- "sel for said defendant then and there excepted, and "the same was then and there noted."

See also defendant's answer, at page 35, where this question is put in issue.

On this point we do not wish to be misunderstood. We do not mean to intimate but that the State may create corporations, which are "citizens" within the constitution and the act of Congress. What we do mean to say is—the town of Venice is not such a corporation, *by the laws of the State of New York.*

Individuals and associations are frequently declared *quasi* corporations, that they may be sued in *some particular* way—or by some *particular person*, or in *some particular court*—or in some *particular place*, but none of them are "citizens" within the meaning of the act of Congress or the Constitution of the United States.

Formerly the State Prisons of the State of New York were made *quasi* corporations, and the agents of them could sue and be sued, for all matters concerning the Prisons. But did that make the State Prisons "citizens?" Were *they* "citizens" simply because the agent could "sue and be sued for all matters concerning the Prisons?" Could a non-resident subject such agents to the jurisdiction of the United States Court? If so, what becomes of the statute declaring such actions local, and making them triable in particular places, and where a United States Court is never held? *The right to sue and be sued is not the criterion by which "citizenship" is to be established.*—Article XIV. §1, U. S. Constitution.

The State is not suable as a "*citizen.*" Nor is any department of the State, as such, a "citizen." The Executive, Legislative and Judicial departments of the State are not "citizens" of the State, but are, *like towns* and police districts, in the State

of New York, parts and portions *of the machinery of the State*, and in no sense "citizens" of the State. In this particular they are entirely distinct *from Insurance and Bridge Companies, from Railroads and Religious corporations, created by the State.* Such corporations are no part of the machinery of the State Government of New York, but creatures of the State. Counsel is not contending but what a State can, (though it may well be doubted,) make the Judicial, or Legislative, or the Executive departments, or the State Prisons, County Jails, and Poor Houses, "citizens," and as such, suable in the United States Court. All that counsel is contending for is, that the State of New York has not yet made them such, any more than it has made the towns of the State, "citizens" of the State. It is believed that there are towns in the State of New York without a resident inhabitant.

The following are the provisions of the Revised Statutes on the subject :

Title 1, Part 1, Chap. XI., "Of towns as Bodies Corporate."
"Article First, of the Powers and Rights of Towns as Bod-
"ies Corporate."
"Section 1. Each town, as a body corporate, has capacity,"
"To sue and be sued, *in the manner prescribed in the laws of this State.*"

1 vol. Rev. St. 337, 1 Ed.

They are *only* body corporates for the purpose of "*suing and being sued in the manner prescribed in the laws of the State of New York.*"

See the Reviser's Notes to the above section. 3 vol.
R. S. of New York, page 482.

These are very limited powers. The towns of the State of New York are *not* corporations for the purpose of suing and being sued *generally*, but *only* in a *particular manner.* The words "manner" and "in" as used in the Revised Statutes, give no countenance to the idea that they can be sued in the Circuit Court of the United States. If so, why cannot they be sued in Ohio? If the word "manner" simply means the mode and manner of serving process, to wit, on a Supervisor, (See 1 vol. R. Statutes, page 357 & 3, 1 Ed.) then most clearly a

town can be sued in the State of Ohio, or any other State, if a Supervisor happens to cross the line, or go into another State.

"Towns and counties were not corporations in any sense, "when the Constitution" [Constitution of 1821] "was adopted; "nor are they more than *quasi* corporations even now." Paige, Senator, in the Court of Errors, 4 Hill R. 384, bottom of page 395, Purdy vs. The People.

When the United States Constitution was adopted, the word "citizen" meant flesh and blood—a man, a person, one who could "speak," one who could be "scourged," and one capable of motion.

See Article 3, Section 2, of the Constitution of the United States.

"Civis—A citizen, a free inhabitant of a town or city." Leverett's Latin Dictionary. See also Ainsworth's Latin Dictionary, word "civis." "Citizen—A freeman, an inhabitant of a city."—Johnson's Dictionary. "I am a Roman citizen. I have served under Lucius Pretius," &c.—Cicero's Oration against Verres.

"But Paul said, I am a man, which am a Jew, of Tarsus, a "city of Cilicia, a *citizen* of no mean city, and I beseech thee "suffer me to speak to the people."

"Is it lawful for you to scourge a man that is a Roman, and "uncondemned?"

And in this same sense is the word used in the Constitution. "The citizens of each State shall be entitled to all the *privileges and immunities of citizens of the several States.*" Article 4, Section 2, of the Constitution of the United States."

What "privileges and immunities" is the town of Venice entitled to, *in the State of Pennsylvania? Can it collect taxes there?*

That the meaning of the word "citizen" has not changed since St. Paul's and Cicero's time, see Webster's, Richardson's and Walker's Dictionary, and also Bouvier's and Jacob's Law Dictionary, word "*citizen.*"

A town in the State of New York is not only a part of the machinery of the State, but one of the most important parts of it, for it is only through the machinery of the towns, that all the taxes of the State are collected and paid.

There is no analogy between a town, in the State of New York, and *a corporation created by the State.* The citizens of towns there are not taxed as incorporators, but as inhabitants—residents. No liability attaches to them or their property. All they have to do is to move out of town, and the right to tax them ceases. Demands against corporations are to be collected by execution, against towns in the State of New York *by taxation.* There is no such thing as *stockholders* of towns in the State of New York.

Some bonds are issued under one statute, and some under another. By one statute, the money is to be raised by taxation in *this way*, and by another statute in *that* way, and all through the agency and machinery of the towns as a part and portion of the State Government; and that is the only "manner prescribed in the laws of the State of New York," for the enforcement of the payment of them.

If the payment of them can be enforced by an action in this Court, then are the towns sued and the bonds collected in a "manner" *not* "prescribed in the laws of the State" of New York.

If it be a fact that after common law actions are sustained in this Court, the money can only be collected through the machinery of the town by taxation, and not by execution, does it not demonstrate that the several towns of the State of New York are a part of the machinery of the State, and not a "citizen."

If this action can be sustained, and a judgment recovered, the execution must be to sell the machinery of the State of New York, for the collection of taxes in the town of Venice.

Suppose the Legislature should divide this "citizen" up, annexing a part of it to the adjoining town of Ledyard, and the other part of it to the adjoining town of Moravia, would it still be a "citizen?"

Individuals having money to invest, are under no obligation to invest in the State of New York in these local securities, authorized by special local legislation for local State purposes, but if they will, they should be left to settle their difficulties in the neighborhood where the transaction occurs, and in the Courts of the State which authorized the securities to be issued.

Such a course would avoid all the trouble which will continue to surround with difficulties the collection of such securities *after* they have been pronounced illegal and void in the State Courts of the State; and by holding a town to be, as in fact it is, so far as the State of New York is concerned, a part and portion of the machinery of the State and not a "citizen," it will be avoided, and the State Judges treated by citizens of the State with confidence and respect, instead of being treated, as is now attempted to be done by them, without confidence and with disrespect.

There are, doubtless, two kinds of Judges, as well as two kinds of lawyers. One kind, who can do nothing without guide boards. Shut them up in ever so narrow a lane or way, with a tight board fence ever so high on each side of them, and they would not dare to move, without having hands posted on the fence, with the index fingers pointing out for them the way to go, for fear that by some accident they might get out into the open fields, and do something for which there might be no precedent, and about which there was no established usage or custom. Such men are entirely unfit to deal with systems, to organize governments, or to establish precedents or authority for others. The other kind are men who can build up systems, organize governments, meet and grapple with difficulties and new questions, establish precedents, and make themselves felt and followed. Counsel is fortunate in believing that Judges of the latter class are to meet and decide the question now raised in this court, for the first time, whether in the State of New York and under its statutes, a country town is a "citizen," or a part and portion of the "machinery" of the State Government.

Prominent among those who have occupied such a position in judicial history were Lord Mansfield and Chief Justice

Marshall: Lord Mansfield as shaping the commercial laws of England; and the other by his good sense, his sound judgment and great discrimination, his patience in hearing, and courtesy in deciding, so shaping the decisions of the United States Courts, as to carry out a new and untried principle of government, by sustaining the dignity and character of the State Courts, by leaving to them the settlement of their own local difficulties, and the construction of their own statutes, thereby preserving for his own Court, not only the confidence and good will of the State Judges, but of the members of the legal profession generally, who had assisted, by their learning and industry, the Judges of those courts in coming to the conclusions at which they arrived, in reference to their own institutions and laws.

The judicial history of the State of New York is not wanting in the names of such distinguished Jurists. In many particulars a strong resemblance existed between Chief Justice Savage and Chief Justice Marshall. The names of Chief Justice Bronson and Mr. Justice Cowen will, also, ever be remembered with respect.

A careful reader of their opinions cannot fail to perceive, however, the broad distinction which influenced them.

Judge Cowen, when a cause was argued, turned to his library to ascertain what others had said on the subject.

Chief Justice Bronson, on the contrary, turned to his window, and looking out on the busy, moving crowd of enterprise before him, said, How will such and such a decision affect them and the business in which they are lawfully engaged.

In preparing these points, counsel has endeavored to follow the example of both of those distinguished jurists.

Whether the tax-payers of the town of Venice shall pay the amount claimed in this action, is a question of very little importance—but whether, what has been resorted to, as above described, in order to collect it, shall be endorsed as moral and correct, *is* of consequence. The duty of counsel is discharged when he has presented to a court or jury, the case as he understands it, and has honestly and faithfully illustrated it with

such abilities as he may possess. There is, however, a moral sense, notwithstanding the doubts which Paley attempts to throw over it, which will eventually triumph over error; and in referring to the principles maintained by the State Judges, who finally decided and disposed of these questions in the State Courts, the labored and able opinion of Judge Welles, on deciding the demurrer to the complaints, and the noble and moral consideration which influenced the Judiciary Committee of the Senate to report against, and the Legislature to refuse to pass, any enabling act for the relief of these bond holders, the language of Tacitus, in his closing remarks of the Life of Agricola, may well be applied—"delineated with truth and fairly consigned to posterity, they will survive and triumph over the injuries of time."

It has been suggested that this court would, in case of affirmance of the judgment below, affirm it with ten per cent. costs. It is not believed that this court will thus punish tax-payers for placing faith in the decisions of their own Courts, and the enactments of their own Legislature. Instead of condemning them, it is believed their conduct will be commended.

XIV.

A new trial should be granted.

Auburn, N. Y., December, 1874.

WARREN T. WORDEN and
WARREN A. WORDEN,
Att'y and Counsel for Pl'ff in Error.

APPENDIX.

Schedule A.

[Laws of 1852, page 593, Chap. 375.]

AN ACT *to authorize any town in the County of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie or Cayuga and Susquehannah Railroad.*

Passed April 16, 1852, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows :

§ 1. It shall be lawful for the Supervisor of any town in the county of Cayuga, and the assessors of such town, who are appointed by this act as commissioners to act in conjunction with the said supervisor in effecting and executing the purposes of this act, to *borrow* on the faith and credit of said town, such a sum of money as they may deem necessary, not to exceed twenty-five thousand dollars, for a term of time not exceeding twenty years, with such rate of interest as may be agreed upon, not exceeding seven per cent per annum, and to execute therefor, under their official signatures, a bond or bonds on which the interest shall be made payable annually or semi-annually, during the term said money may be borrowed, and the principal and interest of which loan shall be made payable in such sums, and at such times and place as shall be agreed upon and expressed in the bonds duly executed under the authority of this act. All moneys borrowed under the authority of this act, shall be paid over to the president and directors of such railroad company, (now organized or such company as may be organized according to the provisions of the general railroad law, passed April 2, 1850,) as may be expressed by the written assent of two-thirds of the

Amount that may be borrowed, time and rate of interest.

Moneys to be paid over to the R. R. Co.

resident tax payers of said town, to be expended by such president and directors in grading, constructing and maintaining a railroad or railroads passing through the city of Auburn, and connecting Lake Ontario with the Susquehannah and Cayuga railroad, or the New York and Erie railroad; provided always, that the said supervisor and commissioners shall have no power to do any of the acts authorized by this act, until a railroad company has been duly organized according to the requirements of the general railroad law for the purpose of constructing the aforesaid described railroad, and the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment roll of such town made next previous to the time such money may be borrowed, shall have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the Clerk's office of Cayuga county, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid, comprise two-thirds of all the resident tax-payers of said town on its assessment roll next previous thereto.

Supervisor and commissioners of any town may take stock.

§ 2. It shall be lawful for the supervisor and commissioners of any town in said county, on obtaining and filing such assent, as provided in the first section, to subscribe for and take in the name of and for said town, such a number of shares of the capital stock of such company as shall or may be organized for the purpose of constructing the aforesaid described railroad or railroads, as will be equal to the amount of the bonds executed under the authority of this act; and such town may, with the assent of the number of tax-payers aforesaid, instead of borrowing the money allowed to be raised upon the bonds of said town, or upon its faith and credit, as in the first section of this act mentioned, raise the amount of its subscription to the stock of said railroad company by tax upon the taxable property of said town, and which tax may be levied and collected in the manner mentioned in this act by the supervisors of said

Amount of subscription may be raised by tax instead of borrowing.

county, and in such sums as the said supervisors may determine and direct.

Supervisor to act in meetings for the town.

§ 3. In case any town in said county shall become a stock-holder in said company by this act provided, it shall be lawful for the supervisor of such town to participate in and to act, in all the regularly and legally organized meetings of the stock-holders of said railroad company, in the name of and for said town, with the same powers and privileges as personal stock-holders.

Board of supervisors may levy a tax to pay interest.

§ 4. The Board of Supervisors of the county of Cayuga are hereby authorized and required, at their annual meetings to cause to be levied and collected in the same manner as town charges are levied and collected, from the taxable inhabitants and property of such town, borrowing money as above provided, over and above the expenses of collecting the same, a sum equal to the interest due or to become due, on the bonds executed by such supervisor and commissioners in accordance with the provisions and purposes of this act; which sum is to be paid to the supervisor and commissioners of the said town from which said sum shall be levied and collected, by the treasurer of the said county of Cayuga, at his office, within twenty days after the same shall have been collected and paid over to said treasurer; and the said supervisor and commissioners shall pay or cause to be paid the aforesaid sum of money on the bonds of said town executed under this act, in payment of the interest thereon that shall then have accrued, or as the same may accrue. The board of supervisors are also authorized and required, in each of the years succeeding the fifth year from the time such money may be borrowed by any such town respectively, or before the expiration of such time, if any default be made by said town in paying the principal or interest of said bond by its commissioners executed under this act, as the same accrue, to cause to be levied and collected from the taxable inhabitants and property of the town, borrowing said money over and above the expenses of collecting the same, and in the same manner as town charges are levied and

In case of default by any town.

collected, a sum in addition to the interest which must annually become due, equal to such portions of the principal as shall, by the terms and conditions of the bonds, become due before the next succeeding annual meeting of said supervisors, which sum shall be paid by the treasurer of Cayuga county, at his office, to the supervisor and commissioners of the said town, within the time above limited for the payment of any interest collected as aforesaid, and which sum shall be applied by said supervisor and commissioners in payment on the bonds of said town, as the same shall mature and become payable.

Dividends, profits, &c., how to be applied.

§ 5. It shall be lawful to apply the dividends of the profits and earnings of the said proposed railroad, which shall be made to and belong to any town in said county, on the shares of capital stock owned by such town in payment of the interest on the bonds provided for by this act, which dividends the supervisor and commissioners of the town owning such shares of stock are authorized and required to demand and receive, at the office of said company, and to give receipts therefor, and to pay the same to the holders of the aforesaid bonds in payment of the interest thereon; and in case such payments of dividends are made to such supervisor of the town to which the same belong, and are actually in hand ready to be applied for the next payment of interest of the bonds of such town, the board of supervisors shall not cause, for the time being, to be levied and collected, any greater sum to pay interest on the bonds of such town than may be necessary in addition to such dividends in hand, to pay the interest on said bonds as it accrues. It shall also be lawful, in case the dividends shall in any year exceed in amount the yearly interest accruing on the bonds, for the supervisor and said commissioners to authorize and direct such excess, in such manner as they or a majority of them may approve, to be invested in their names for the benefit of said town, as a fund to be applied as far as such excess will go in payment of the principal or interest of the bonds of such town, as the same mature and become payable.

§ 6. It shall be lawful for the tax paying electors of the town borrowing money, as aforesaid, at any annual town meeting, after the completion of the railroad, to which subscription shall be made, if two-thirds of all the tax paying electors of such town shall in writing so direct, to authorize and require a sale of the shares of stock which said town shall own in the capital stock of said railroad company, and to direct the terms on which such sale shall be made, and in case such authority and requirement shall be duly made and filed in the clerk's office of said county, then the said supervisor and commissioners shall have authority by this act to make a good and valid sale of the stock subscribed for and owned by the said town authorizing such sale, and to transfer and assign to the purchasers, the certificates for said stock, according to the laws and by-laws of said railroad company.

Stock may be sold after completion of the road.

§ 7. In case the said shares of railroad stock of said town held by it under this act, shall be sold as provided in and by the foregoing section of this act, then the moneys arising therefrom shall be applied, if said bonds of such town are then, or soon thereafter to become due and payable, to the payment of such bonds; and if said bonds are not at the time of the sale of the said stock due and payable, and the owner or owners of said bonds will not accept the moneys arising from the sale of said stock, in payment in whole or in part of the bonds by him or them held, then it shall be the duty of the said supervisor, and the said commissioners, and they are hereby vested with authority for that purpose, to loan or invest in their names, for the benefit of the said town for which they act, and upon such security or in such manner as they shall approve, the avails of said sale of stock, as a sinking fund to meet the payment as far as the same will go, of the principal and interest of the said bonds, as the same shall become due; and the supervisors of the said county shall, in such case, cause to be levied and collected annually from the taxable property of such town, and in the manner mentioned in the fourth section of this act, such sum

Moneys arising from the sale, how to be applied.

as shall be sufficient to enable said supervisor and commissioners to pay the accruing or accrued interest on such bonds as the same are payable, and the said board of supervisors shall also in such case, cause to be levied and collected from the taxable property of such town, and in the manner mentioned in the fourth section of this act, at such time or times as said board of supervisors shall prescribe, such sum or sums of money as shall be sufficient to enable said town supervisor and commissioners to pay off said bonds as they mature; and if any such sum or sums of money are levied and collected before the same can be properly paid upon said bonds, then the said town supervisor and commissioners shall, in such manner as they may approve, invest or loan said money, until the same shall be required for the payment of said bonds. If, upon the sale of the shares of said stock, there shall be a surplus over and above the amount of principal and interest due and to become due on said bonds, then the said surplus shall belong to said town, and may be held, used and applied by it for any town purposes.

Copies of the bonds issued to be filed in county clerk's office.

§ 8. The supervisor of the town borrowing money under this act, shall cause duplicate copies of the bonds executed under the provisions of this act, to be filed in the county clerk's office of the county of Cayuga, and shall make an annual report to the board of supervisors of Cayuga county, at each annual meeting thereof, of the amount of the bonds executed under this act, of the amount of interest, if any, that will become due before the next succeeding annual meeting of said supervisors, and the amount of the principal, if any, that will in the meantime by the terms of the bonds become due, and of the amount of the dividends and taxes which have been received, and how the same have been applied.

Compensation of supervisors and commissioners.

§ 9. The supervisor of the town borrowing money under this act, and the said commissioners thereof shall be severally allowed the sum of two dollars for each day's service, necessarily and actually rendered by them in the discharge of the duties imposed by this act; and they shall also be al-

lowed all sums necessarily expended by them in discharging the duties imposed by this act, which sums shall be audited and collected as other town charges.

Election of railroad commissioners.

§ 10. The assessors appointed to act as commissioners by section first of this act, shall hold their office till the next annual town meeting of their town, when it shall be the duty of the electors of said town to elect, by ballot, in the same manner that town officers are now elected, two commissioners to be called "railroad commissioners," to act in conjunction with the supervisor in carrying into effect the provisions of this act, and the action of a majority of such supervisor and commissioners shall at all times be sufficient for carrying into effect the provisions of this act.

§ 11. This act shall take effect immediately.

Schedule B.

SUPREME COURT.

THE PEOPLE ex-rel. BENJAMIN GOULD, *ag'st* THE BOARD OF SUPERVISORS OF CAYUGA COUNTY, AND THE SUPERVISOR OF THE TOWN OF VENICE.	7TH JUDICIAL DISTRICT—GENERAL TERM, MARCH, 1858

Present, JOHNSON, STRONG and SMITH, Justices.

By the Court, JOHNSON, *Justice :*

Although the Board of Supervisors of the county of Cayuga are authorized and required, at their annual meetings, to cause to be levied and collected, in the same manner as town charges are levied and collected, from the taxable inhabitants and property of such town, borrowing money, as provided by the act, a sum equal to the interest due, or to become due, on the bonds executed and issued, to secure the payment of the money so borrowed, it is evident, I think, that the statute contemplates that the action of such Board in levying such tax, shall be based upon the official information communicated to it by the Supervisor of the town upon which the tax is to be levied. Session Laws of 1852, 593, §4.

It is made the duty of the Supervisor of the town, borrowing money under the act, to make an annual report to the Board of Supervisors of the county, at each annual meeting thereof, of the amount of bonds executed under the act, of the amount of interest, if any, that will become due before the next succeeding annual meeting thereof, and the amount of the principal, if any, that will, in the meantime, by the terms of the bonds, become due, and of the amounts of the

dividends and taxes which have been received, and how the same have been applied. This is prescribed by §8 of the act. This was obviously to enable the Board to know and to determine what amount to levy upon such town, and without such information, in the manner which the statute prescribes, I do not see how it would be possible for the Board to levy the tax. Without such information, they could not be expected to know what amount of bonds had been issued, and if any had been issued, what amount remained outstanding as a charge upon the town, what dividends had been received from the corporation, whether the stock received by the town had been sold, and how the proceeds had been applied, and other facts which it would be necessary to know, in order to determine the town charges from this source, to be included in the tax.

In the case before us, the Supervisor, whose duty it became to make a report, reported to the Board, that his town had no bonds outstanding, issued by virtue of the act, and that there was no interest due, or to grow due, on any of such bonds.

It is insisted, on the part of the Relator, that the Board should, notwithstanding this report, have levied a tax upon such town, sufficient to cover the amount of interest on the whole amount of bonds, of which duplicate copies had been filed by the Supervisor of said town, in the office of the Clerk of said county, as of bonds executed for monies borrowed by such town, under the provision of the act.

But I do not think this can be required of the Board, or ndeed, that they would be authorized so to act, in the face of the report of the officer, whose duty it was, by Statute, to give them accurate and specific information on the subject. The statute evidently designed this report of the Supervisor, as sufficient and satisfactory evidence to the Board, of the facts contained in it, and if we concede that the Board had power to go beyond the report and take further evidence upon the subject, they were not bound to do so, but might rely upon the report as correct. If the design of the report was

to raise the question of the legality of the execution and issuing of the bonds, merely, and to deny that they constituted any legal or valid claim against the town, by reason of such unauthorized and illegal issue, the Board might well refuse to enter upon the investigation of such a question.

A Board of Supervisors is certainly not the most appropriate tribunal for such questions, of so grave and complicated a character.

The report of the Supervisor, therefore, furnishes a complete and satisfactory answer to the application for a mandamus against the Board of Supervisors.

As between the Relator and the Supervisor, however, a different rule would prevail. The report of the latter furnishes no answer for him, unless it is sworn to be true, and this invokes the whole merits of the controversy.

Upon this question I do not propose to enter, because the motion must, in my judgment, be determined upon other grounds. Whether this writ should be granted or not, in any case, rests in the sound discretion of the Court. It is the practice never to grant it, unless it will afford a remedy to the Relator, and generally not in that case, if such Relator has an adequate remedy by action. Here it is obvious that the writ against the Supervisor alone, at this time, would afford the Relator no relief whatever.

The annual meeting of the Board of Supervisors has passed, and the tax for the year has already been levied, and the warrants for the collection thereof, delivered to the several collectors.

It is obvious, therefore, that a report from the Supervisor now, as the Relators claim it should be made, could by no possibility result in a levy and collection of a tax for the annual interest of the bonds about to fall due, conceding that there is no question as to the validity of such bonds.

But it is quite clear, that the real questions which lie at the foundation of this controversy, which seem to be the constitutionality of the statute, and whether the bonds were ever in fact issued so as to become chargeable upon the town, if the

statute is a valid constitutional enactment, can be far better and more satisfactorily tried and determined by an action against the town directly, and upon regular pleadings, than upon a motion of this character.

There is no doubt, I apprehend, that an action can be brought directly against the town in its corporate character, to recover the interest upon these bonds, if they are binding upon the town, and the officer of the town, whose duty it was to report the amount to the Board of Supervisors, has neglected or refused to perform that duty.

I am of opinion, therefore, that the writ should be refused, and the Relator left to his remedy by action against the town, *until it has been determined whether* the statute is a valid law, and whether the bonds have been regularly and legally issued, so as to become binding upon the town.

The application must therefore be denied, but under the circumstances no cost will be allowed to either party.

The two other applications, which depend upon the same questions, must be determined in the same manner.

Schedule C.

IN SUPREME COURT.

JOSIAH N. STARIN, *ag'st* THE TOWN OF GENOA.	Monroe Special Term, September, 1858. Before WELLES, Justice. Demurrer to complaint. WARREN T. WORDEN for Defendant. DAVID WRIGHT for Plaintiff.

WELLES, Justice. In the consideration of this case, I shall assume the constitutionality of the act of the Legislature, passed April 16th, 1852, under which the Bonds were issued, upon which this action is brought. Sess. Laws of 1852, ch. 375, p. 593.

The first section of the act referred to, authorizes the Supervisors of any town in the county of Cayuga, and the Assessors of such town, who were appointed by said act Commissioners to act in conjunction with the Supervisor in effecting and executing the purposes of the act, to borrow, on the faith and credit of such town, a sum of money, not exceeding twenty-five thousand dollars, for a term of time not exceeding twenty years, and to execute therefor, under their official signatures, a bond or bonds, &c.

It next provides that all moneys borrowed under the authority of the act, should be paid over to the President and Directors of such Railroad Company, (then organized, or such company as might be organized according to the provisions of the general railroad law, passed April 2d, 1850,) as might be expressed by the written assent of two-thirds of the resident tax-payers of said town, to be expended by said President and Directors in grading, constructing and maintaining a railroad or railroads, passing through the city of Auburn and connecting Lake Ontario with the Susquehannah and Cayuga Railroad, or the New York and Erie Railroad.

The section then proceeds as follows: *Provided* always, that the said Supervisor and Commissioners shall have no power to do any of the acts authorized by this act, until a Railroad Company has been duly organized according to the requirements of the general railroad law, for the purpose of constructing the aforesaid described railroad, and the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment roll of such town, made next previous to the time such money may be borrowed, shall have been obtained by such Supervisor and Commissioners, or some one or more of them, and filed in the Clerk's Office of Cayuga county, together with the affidavit of such Supervisor or Commissioners, or any two of them attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid, comprise two-thirds of all the resident tax-payers of said town on its assessment roll next previous thereto.

The second section of the act provides that it should be lawful for the Supervisor and Commissioners of any town in said county, "on obtaining and filing such assent as provided "in the first section, to subscribe for and take, in the name of, "and for said town, such a number of shares of the capital "stock of such Company as shall or may be organized for the "purposes of constructing the aforesaid described railroad or "railroads, as will be equal to the amount of the bonds exe-"cuted under the authority of this act." The residue of the section gives the town the alternative, with the like assent of the tax-payers, instead of borrowing the money upon its bonds as provided in the first section, to raise the amount of its subscription to the stock of the said road, by tax upon the property of the town.

The complaint, after reciting the foregoing provisions, and referring to the act generally, proceeds to allege in substance, that on or about the twenty-third day of August, eighteen hundred and fifty-two, a Railroad Company was duly organized according to the provisions of the general Railroad Law, by the name of the "Lake Ontario, Auburn and New York

Railroad Company," &c. That by virtue of the power conferred by the act upon the Supervisor and Commissioners of the town of Genoa, "afterwards and about the twenty-sixth day of February, eighteen hundred and fifty-three, a majority of the Supervisor and Commissioners of said town, duly made and executed, under their official signatures, twenty-five bonds, each one of which was an exact duplicate or counterpart of every other, except that each was differently numbered from every other, the numbers being from one to twenty-five, inclusive, &c., and by each of which bonds the said town of Genoa, pursuant to said act, and for the purpose of aiding the construction of said Railroad, promised to pay Ashbel Avery, or bearer, the sum of one thousand dollars, with interest, and the principal to be reimbursable at the expiration of twenty years from the first day of January, eighteen hundred and fifty-three."

That simultaneously with the execution of said bonds, the Supervisor and Commissioners subscribed for, and took in the name of said town of Genoa, four hundred and sixty shares of the capital stock of said Railroad Company, of the par value of fifty dollars each share.

That afterwards, and in or about the month of May, eighteen hundred and fifty-three, a majority of the Supervisor and Commissioners of said town, subscribed for and took in like manner the further amount of forty shares of the capital stock of said Railroad Company, of the par value of fifty dollars each share.

That afterwards, and on or about the tenth day of October, eighteen hundred and fifty-three, a majority of the said Supervisor and Commissioners, then having in their possession the said twenty-five bonds, executed as aforesaid, sold, assigned, transferred and set over all of said bonds to the said, "The Lake Ontario, Auburn and New York Railroad Company," in payment of such subscription as aforesaid, and said Company, in consideration thereof, issued and delivered to the said Supervisor and Commissioners of said town, five hundred shares of full stock of the capital stock of said Company,

of the par value of fifty dollars each share, in the name of and for the said town of Genoa, and took and received said bonds in full payment therefor, and the said town of Genoa actually received, and ever afterwards owned and held, and still owns and holds the said stock, which was paid for wholly by the delivery of said bonds, as payment as aforesaid, and not otherwise.

That previous to the execution and delivery of said bonds as aforesaid, or of any of them, the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment roll of said town next previous to the time of the sale of said bonds, was obtained by the Supervisor and Commissioners of said town, and filed in the Clerk's office of Cayuga county, (such assent expressing "The Lake Ontario, Auburn and New York Railroad Company" as the Company to which all monies borrowed under said act, should be paid ;) together with the affidavit of the said Supervisor and Commissioners attached to the statement of such assent, to the effect that the persons whose written assents were thereto attached and filed as aforesaid, composed two-thirds of all the resident tax-payers of said town, on its assessment roll next previous thereto, as required by the provisions of said act ; and duplicate copies of said bonds were also, at or about the time of the transfer of said bonds as aforesaid, duly filed by the said Supervisor and Commissioners in the said County Clerk's office.

That the plaintiff has become, and now is, the *bona-fide* holder and owner, by the purchase thereof for a valuable consideration, of two of said bonds, being numbers twenty-one and twenty-four, with interest remaining unpaid, &c.

The complaint then alleges the non-payment of the interest accrued on the two bonds purchased by the plaintiff, during the years eighteen hundred and fifty-six, seven and eight, and demands judgment therefor, &c.

There are, in my opinion, several grounds upon which the complaint falls short of stating facts sufficient to constitute a

cause of action, which defects are fatal to the plaintiff's right to recover upon the facts alleged.

I. It does not appear that any money was borrowed by the Supervisor and Commissioners of the town of Genoa. It is nowhere so alleged in the complaint.

The act under which the bonds are claimed to have been made, contemplates the borrowing of the money, and the execution of the bonds to be cotemporaneous and concurrent acts of the town officers mentioned; at least there is no authority to execute the bonds, except in security *for the money borrowed.*

They may borrow the money, and execute therefor a bond or bonds, &c., and when the money is borrowed, it is to be paid over to the Railroad Company. Although the payment by the town officers to the Railroad Company of the money borrowed, would not be necessary to the validity of the bonds, yet the requirement is significant in this connection, to show that what the Legislature had in view was to authorize the towns to expose themselves to further taxation, to pay *for money borrowed.*

The authority to the town officers, is to execute the bonds *for money borrowed, and for no other consideration.*

It is claimed, on the part of the plaintiff, that the transfer of the bonds to the Railroad Company, in payment of stock, as stated in the complaint, was a borrowing of money within the spirit and scope of the act. It would be perhaps a sufficient answer to this, that the act gives no authority for such an execution, by the agents of the town, of their powers. The act not only confers certain powers on these officers, but defines and specifies the manner in which the powers shall be executed, and from which they may not lawfully deviate.

The leading and principal, if not the only object of the act, as is manifest by its title and provisions, was to aid in the construction of the Railroad by the borrowing of money upon the credit of the towns, which money, when borrowed, was required to be paid over to the President and Directors of the Railroad Company. To make the bonds, and transfer

them to the Company in payment of stock, is substantially a different thing from borrowing money, and giving the bonds therefor.

The act limits the interest upon which the agents of the towns may borrow the money, to a rate not exceeding seven per cent per annum. But if the plaintiff's theory can be sustained, there is nothing in the act to prevent this provision being thwarted, by the Railroad Company putting them in market, and selling them below their par value. True, the town would only have to pay the seven per cent., but the object of the act to have the amount of the money for which the bonds were to be given paid over to the Railroad Company, would be defeated. The towns were interested to have the money borrowed tell dollar for dollar, as well in the construction of the Railroad as in the payment for the stock subscribed, and they are not to be bound to any contract made for them, which might defeat, impair or jeopard their rights or interest in that respect. Could it be maintained that under the provisions of this statute, it would have been a good execution of the power conferred, if the town officers had in the first instance made the bonds payable directly to the Railroad Company, and delivered them in payment for the capital stock subscribed by them? Yet that is substantially what they have done.

If the transaction could be upheld in the one case, it could in the other. The act, which *is* the *only* authority under which the town officers have assumed to act, sustains neither.

The tax-payers might be willing to assent to an actual borrowing of the money, and to binding their town for its repayment, and refuse their assent to the transaction set forth in the complaint.

II. The complaint does not show that the written assent of two-thirds of the resident persons taxed in the town of Genoa, was obtained before the Supervisor and Commissioners commenced the execution of the powers conferred on them, as required by the first section of the act. Such assent was a condition precedent to their right to do any act whatever,

except the act of obtaining the assent. Until it should be obtained, they had no power whatever. It is an inflexible rule of law, that conditions precedent must in all cases be strictly performed.

The assent does not show what the tax-payers who were parties to it, thereby gave their assent to, excepting that the monies borrowed should be paid to "The Lake Ontario, Auburn and New York Railroad Company."

The evident meaning of the act is, that the said tax-payers should give their written assent to all and each of the acts of the town officers, to be by them performed under the act of the Legislature. No doubt one instrument might embrace an assent to all the acts to be done by the Supervisor and Commissioners under the statute in question. But the things to which the tax-payers assented should be expressed, either in such general language as to include them all, or by specifying the particular things to which their assent was accorded. Such, in my judgment, is the true interpretation of the act, although the meaning is somewhat obscurely expressed. When the meaning and true interpretation of a statute is ascertained, it is to be executed and applied in the same manner as if such meaning was fully expressed in terms; and in pleading a compliance with it, the facts must be stated with the same precision. If the statute had expressed in terms that the Supervisor and Commissioners should have no power to borrow any money on the credit of the town, to execute any bond or bonds therefor to pay such borrowed money to the Railroad Company, or to subscribe for and take any of the capital stock of the same, until the assent in writing thereto of two-thirds of the resident tax-payers of the town had been first obtained, it would scarcely be contended that the mere statement that the written assent of two-thirds, &c., as stated in the complaint, had been obtained, without stating to what the parties assented, except as before stated, would be a sufficient allegation of such assent. Yet such is the legal interpretation of the statute, and such is the whole of the allegation in that respect in the complaint, the fair reading of

which is that the tax-payers assented to paying the money to be borrowed, to the Railroad company mentioned, and nothing else. *Expressio unius est exclusio alterius*, is a maxim applicable to this particular question.

III. Whatever the assent alleged in the complaint in fact was, it is not shown to have been by or from the proper class of resident tax-payers of the town of Genoa. The bonds were executed on the twenty-sixth day of February, eighteen hundred and fifty-three, and the money borrowed, if the transaction disclosed in the complaint can, by any stretch of judicial construction, be regarded a borrowing of money within the spirit of the act, was borrowed on the tenth of October of the same year.

The assent required by the act was to be of "two-thirds of the resident persons taxed in said town, *as appearing on the assessment roll of said town* MADE NEXT PREVIOUS *to the time such money may be borrowed.*" Assessors of towns are required by law to ascertain the names of all the taxable inhabitants in their towns during the months of May and June of each year: (1 R. S. 4th Ed., p. 77, §8,) to prepare an assessment roll (§9) to have the same completed on or before the first day of August, and to leave one fair copy with one of their number, and put up notices thereof in three or more public places in the town. (Id. 718, §17.) The roll being revised and properly certified, is to be delivered to the Supervisor of the town, on or before the first day of September in every year, and the Supervisor is to deliver the same to the Board of Supervisors of the county, at their next meeting. (Id. 720, §24.)

It appears by the complaint that the written assent therein mentioned, was obtained previous to the execution and delivery of the bonds, and that it was the assent of two-thirds of the resident persons [illegible] in said town, as appearing on the assessment roll of said town next previous to the time of the sale of said bonds. It must be assumed, until the contrary appears, or is alleged, that an assessment roll of the town of Genoa was made at the time, and in the manner required by

law, which must have been between the first day of May and the first day of September, of the year eighteen hundred and fifty-three. The law made this the duty of the assessors, and it will not be presumed that they have neglected their duty. If the transfer of the bonds to the Railroad Company, and the issuing of the stock of the Company to the town, was a borrowing of money by the agents of the town, as is claimed on behalf of the plaintiff, the assent should have been given by the tax-payers appearing on that assessment roll, as that was the one made next previous to *such* borrowing. But the complaint alleges that such assent was obtained before the execution and delivery of the bonds, which would not have been the assent of the tax-payers appearing by *that* assessment roll.

I do not overlook the allegation in the complaint, that the assent mentioned was of the tax-payers as appearing on the assessment roll of the town *next previous to the time of the sale of said bonds.*

If that is to be taken as true, then the bonds were executed before any assent whatever was given by the tax-payers, and consequently without any authority. If the statement that the assent was obtained before the execution of the bonds, is to be adopted, then it was not according to the assessment roll next previous to the borrowing of the money, or which is claimed to be equivalent thereto, the sale of the bonds to the Railroad Company, and receiving the amount of them in the capital stock of the Company.

There were other positions taken by the defendant's counsel in support of the demurrer, which it is not deemed necessary to consider.

In conclusion, I have only to remark, that the statute under consideration contains unusual provisions, and confers extraordinary powers upon the town officers, involving probably long continued and burdensome taxation upon the towns. The Legislature, aware of this, and no doubt partaking to some extent of the enthusiasm which, at the time of the passage of this act, pervaded nearly all classes of the commu-

nity in favor of Railroads, have attempted to throw around the powers conferred, such checks and guards as in their judgment would afford *some* protection to the tax-paying inhabitants of the towns against hasty, loose, and inconsiderate action on the part of the executive and administrative officers, to whom the execution of those powers was committed. Capitalists, investing their money in the securities authorized by the act, were admonished to see to it at their peril, that such guards and checks were observed and obeyed. The bonds authorized to be issued, were not to possess the qualities of commercial paper in regard to their negotiability, in such a sense as to be a protection to persons dealing in them as *bona fide* purchasers or holders, and courts are not to enforce them unless *all* the conditions and provisions provided in the act, under which they were allowed to be made, have been substantially and fully complied with, according to the spirit of the act.

There must be judgment for the defendants upon the demurrer, with leave to the plaintiff to amend his complaint in twenty days after service of the order to be entered herein on payment of the usual costs in such cases.

Schedule D.

A STATEMENT,

Showing *how much* the interest secured to be paid by these bonds *exceeds seven per cent. per annum.*

Interest on $1,000 from March 2, 1853 to July 1, 1853,			$23.06
Interest on $1,000 from July 1, 1853 to January 1, 1854,			35.00
Interest on $23.06 paid July 1, 1853 to January 1, 1854,		$ .81	
Interest on $1,000 from January 1, 1854 to July 1, 1854,			35.00
Interest on $35.00 / .81 } $35.81 from January 1, 1854 to July 1, 1854,		1.26	
Interest on $1,000 from July 1, 1854 to January 1, 1855.			35.00
Interest on $ .81 / 1.26 / 35.00 } $37.07 from January 1, 1855 to July 1, 1855,	$2 07 / 1.30 }	3.37	
Interest on $1,000 from January 1, 1855 to July 1, 1855,			35.00
Interest on $ 3.37 / 35.00 } $38.37 from January 1, 1855 to July 1, 1855,	$3.37 / 1.34 }	4.71	
Interest on $1,000 from July 1, 1855 to January 1, 1856,			35.00
Interest on $ 4.71 / 35.00 } $39.71 from July 1, 1855 to January 1, 1856,	$4.71 / 1.39 }	6.10	
Interest on $1,000 from January 1, 1856 to July 1, 1856,			35.00
Interest on $ 6.10 / 35 00 } $41.10 from January 1, 1856 to July 1, 1856,	$6.10 / 1.44 }	7.54	
Interest on $1,000 from July 1, 1856 to January 1, 1857,			35.00
Interest on $ 7.54 / 35.00 } $42.54 from July 1, 1856 to January 1, 1857,	$7.54 / 1.49 }	9.03	
Interest on $1,000 from January 1, 1857 to July 1, 1857,			35.00
Interest on $ 9.03 / 35.00 } $44.03 from January 1, 1857 to July 1, 1857,	$9.03 / 1.54 }	10.57	
Interest on $1,000 from July 1, 1857, to January 1, 1858,			35.00
Interest on $10 57 / 35 00 } $45.57 from July 1, 1857 to January 1, 1858,	$10.57 / 1.60 }	12 17	
Interest on $1,000 from January 1, 1858 to July 1, 1858,			35.00
Interest on $12.17 / 35.00 } $47.17 from January 1, 1858 to July 1, 1858,	$12.17 / 1.66 }	13 83	
Interest on $1,000 from July 1, 1858 to January 1, 1859,			35.00
Interest on $13.83 / 35.00 } $48.83 from July 1, 1858 to January 1, 1859,	$13.83 / 1.71 }	15.54	

Interest on $1,000 from January 1, 1859 to July 1, 1859,		35.00
Interest on $15.54 / 35.00 / $50.54 from January 1, 1859 to July 1, 1859,	$15.54 / 1.77	17.31
Interest on $1,000 from July 1, 1859 to January 1, 1860,		35.00
Interest on $17.31 / 35.00 / $52.31 from July 1, 1859 to January 1, 1860,	$17.31 / 1.83	19.14
Interest on $1,000 from January 1, 1860 to July 1, 1860,		35.00
Interest on $19.14 / 35.00 / $54.14 from January 1, 1860 to July 1, 1860,	$19.14 / 1.89	21.03
Interest on $1,000 from July 1, 1860 to January 1, 1861,		35.00
Interest on $21.03 / 35.00 / $56,03 from July 1, 1860 to January 1, 1861,	$21.03 / 1.96	22.99
Interest on $1,000 from January 1, 1861, to July 1, 1861,		35.00
Interest on $22.99 / 35.00 / $59.99 from January 1, 1861 to July 1, 1861,	$22.99 / 2.03	25.02
Interest on $1,000 from July 1, 1861 to January 1, 1862,		35.00
Interest on $25.02 / 35.00 / $60.02 from July 1, 1861 to January 1, 1862,	$25.02 / 2.10	27.12
Interest on $1,000 from January 1, 1862 to July 1, 1862,		35.00
Interest on $27.12 / 35.00 / $62 12 from January 1, 1862 to July 1, 1862,	$27.12 / 2.17	29.29
Interest on $1,000 from July 1, 1862 to January 1, 1863,		35.00
Interest on $29.29 / 35.00 / $64.29 from July 1, 1862 to January 1, 1863,	$29.29 / 2.25	31.54
Interest on $1,000 from January 1, 1863, to July 1, 1863,		35.00
Interest on $31.54 / 35.00 / $66.54 from January 1, 1863 to July 1, 1864,	31.54 / 2.33	33.87
Interest on $1,000 from July 1, 1863 to January 1, 1864,		35.00
Interest on $33.87 / 35.00 / $68.87 from July 1, 1863 to January 1, 1864,	$33.87 / 2.41	36.28
Interest on $1,000 from January 1, 1864 to July 1, 1864,		35.00
Interest on $36.28 / 35.00 / $71.28 from January 1, 1864 to July 1, 1864,	$36.28 / 2.50	38.78
Interest on $1,000 from July 1, 1864 to January 1, 1865,		35.00
Interest on $38.78 / 35.00 / $73.78 from July 1, 1864 to January 1, 1865,	$38.78 / 2.59	41.37
Interest on $1,000 from January 1, 1865 to July 1, 1865,		35.00
Interest on $41.37 / 35.00 / $76.37 from January 1, 1865 to July 1, 1865,	$41.37 / 2.67	44.04
Interest on $1,000 from July 1, 1865 to January 1, 1866,		35.00
Interest on $44.04 / 35.00 / $79.04 from July 1, 1865 to January 1, 1866,	$44.04 / 2.67	64 81
Interest on $1,000 from January 1, 1866 to July 1, 1866,		35.00
Interest on $46.81 / 35.00 / $81.81 from January 1, 1866 to July 1, 1866,	46.81 / 2.87	49.68
Interest on $1,000 from July 1, 1866 to January 1, 1867,		35.00
Interest on $49.68 / 35.00 / $84.68 from July 1, 1866 to January 1, 1867,	$49.68 / 2.96	52.64

Interest on $1,000 from January 1, 1867 to July 1, 1867,			35.00
Interest on $52.64	$52.64		
35.00 $84.64 from January 1, 1867 to July 1, 1867,	3.07	55.71	
Interest on $1,000 from July 1, 1867 to January 1, 1868,			35.00
Interest on $55.71	$55.71		
35.00 $90.71 from July 1, 1867 to January 1, 1868,	3.17	58.88	
Interest on $1,000 from January 1, 1868 to July 1, 1868,			35.00
Interest on $58.88	$58.88		
35.00 $93.88 from January 1, 1868 to July 1, 1868,	3.29	62.17	
Interest on $1,000 from July 1, 1868 to January 1, 1869,			35.00
Interest on $62.17	$62.17		
35.00 $97.17 from July 1, 1868 to January 1, 1869,	3.41	65.58	
Interest on $1,000 from January 1, 1869 to July 1, 1869,			35.00
Interest on $65 58	$65.58		
35.00 $100.58 from January 1, 1869 to July 1, 1869,	3.52	69.10	
Interest on $1,000 from July 1, 1869 to January 1, 1870,			35.00
Interest on $69.10	69.10		
35.00 $104.10 from July 1, 1869 to January 1, 1870,	3.64	72.64	
Interest on $1,000 from January 1, 1870 to July 1, 1870,			35.00
Interest on $72.74	$72.74		
35.00 $107.74 from January 1, 1870 to July 1, 1870,	3.77	76.51	
Interest on $1,000 from July 1, 1870 to January 1, 1871,			35.00
Interest on $76.51	$76.51		
35.00 $111.51 from July 1, 1870 to January 1, 1871,	3.91	80.42	
Interest on $1,000 from January 1, 1871 to July 1, 1871,			35.00
Interest on $80.42	$80.42		
35.00 $115.42 from January 1, 1871 to July 1, 1871,	4.04	84.46	
Interest on $1,000 from July 1, 1871 to January 1, 1872,			35.00
Interest on 84.46	$84.46		
35.00 $119.46 from July 1, 1871 to January 1, 1872,	4.19	88.65	
Interest on $1,000 from January 1, 1872 to July 1, 1872,			35.00
Interest on $88.65	$88.65		
35.00 $123.65 from January 1, 1872 to July 1, 1872,	4.33	92.98	
Interest on $1,000 from July 1, 1872 to January 1, 1873,			35.00
Interest on $92.98	$92.98		
35.00 $127.98 from July 1, 1872 to January 1, 1873,	4.48	97.46	
Excess on $1,000 over seven per cent. per annum,	$97.46		
Excess on $25,000 over seven per cent. per annum,	$2,436.50		

SUPREME COURT OF THE UNITED STATES.

THE TOWN OF VENICE, PLAINTIFF IN ERROR.

vs.

EVANDER MURDOCK, DEFENDANT IN ERROR.

No. 53.

ARGUMENT FOR DEFENDANT IN ERROR.

D. WRIGHT, Att'y,
And of Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

THE TOWN OF VENICE, Plaintiff in Error, *vs.* EVANDER MURDOCK, Defendant in Error.	*No. 53. Brief on behalf of Defendant in Error. D. Wright, Counsel for Defendant in Error.*

The Counsel for the Plaintiff in Error having in his brief as filed, in his statement of the case, set forth matters which are entirely foreign to the record, renders it necessary that I should state the facts as they appear in the record, and I therefore make the following as a CONCISE ABSTRACT OR STATEMENT OF THE CASE as required by Rule 21.

On the 16th day of April, 1852, the Legislature of the State of New York passed an act entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie or Cayuga and Susquehanna Railroad," a copy of which will be found in the brief on behalf of the plaintiff in error, marked Schedule A, following page 57.

By the 1st Section the Supervisor and Assessors of any town in the county of Cayuga were authorized "to borrow on the faith and credit of the town such a sum of money as they may deem necessary, not to exceed twenty five thousand dollars, for a term of time not exceeding twenty years, with such rate of interest as may be agreed upon, not exceeding seven per cent. per annum, and to execute therefor, under their official signatures, a bond or bonds on which the interest shall be made payable annually or semi-annual, during the term said money may be borrowed, and the principal and interest of which loan shall be made payable in such sums, and at such

times and place as shall be agreed upon and expressed in the bonds duly executed under the authority of this act. All moneys borrowed under the authority of this act shall be paid over to the President and Directors of such Railroad Company (now organized, or such company as may be organized according to the provisions of the general railroad law, passed April 2, 1850.) as may be expressed by the written assent of two-thirds of the resident tax-payers of said town, to be expended by said President and Directors in grading, constructing and maintaining a railroad or railroads passing through the city of Auburn, and connecting Lake Ontario with the Susquehanna and Cayuga Railroad, or the New York and Erie Railroad: *Provided*, always that the said Supervisor and Commissioners shall have no power to do any of the acts authorized by this act, until a railroad company has been duly organized according to the requirements of the general railroad law, for the purpose of constructing the aforesaid described railroad, and the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment roll of said town made next previous to the time such money may be borrowed, shall have been obtained by such Supervisor and Commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such Supervisor and Commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid, comprise two-thirds of all the resident tax-payers of said town on its assessment-roll next previous thereto." The 2nd Section provides, that it should be lawful for the Supervisor and Commissioners of any town in said County, on obtaining and filing such assent, as provided in the first section, to subscribe for and take in the name of and for said town, such a number of shares of the capital stock of such company as shall or may be organized for the purpose of constructing the aforesaid described railroad or railroads, as will be equal to the amount of the bonds executed under the authority of this act; and such town may, with the assent of the number of tax-payers aforesaid, instead of borrowing the money

allowed to be raised upon the bonds of said town *or upon its faith and credit*, as in the first section of this act mentioned, raise the amount of its subscription to the stock of said railroad company by tax upon the the taxable property of said town," &c.

SEC. 3. Provides that the Supervisor may take part in the meeting of stockholders of the Railaoad Co.

SEC. 4. Provides for raising money for the payment of the principal and interest as it becomes due.

SEC. 5. Provides for the application of dividends.

SEC. 6. Provides for a sale of the railroad stock belonging to the town.

SEC. 7. Provides for the application of the avails of stock, if sold, and for raising all money due by tax on the town.

SEC. 8. Provides for the filing of duplicate bonds in the County Clerk's office, and that the supervisor of the town shall report annually to the Board of Supevrisors the amount of bonds executed and the amount which will become due before the next meeting of the Board.

SEC. 9. Prescribes the fees of the Commissioners.

SEC. 10. Provides for the election by the town, at the next town meeting, of two Railroad Commissioners to act as such in the place of the Assessors. (See laws of New York for 1852, page 593, Ch, 375.)

The Supervisor and the Assessors, on the 3rd day of November, 1852, filed in the County Clerk's office the written assent of a large number of the resident tax-payers of the town, and endorsed thereon and filed therewith was the affidavit of the Supervisor and one of the Assessors, as was required by the 1st section of the act. (Record page 40.) On the 1st day of March, 1853, at the annual town meeting held next after the passage of the act, and as required by the 10th section thereof, Calvin King was elected Supervisor, and Jonas Wood and Isaac Smith were elected Railroad Commissioners, of said town. (Record, page 39. fol. 38.) And on the 2nd day of March, 1853, the said supervisor and commissioners executed, under their *official signatures*, as

required by the 1st section of the act, instruments in the form of bonds, but not under seal, towns having no seals, nor were seals recognized by the act. (Record, fol. 38, a copy of which will be found at fol. 60, page 46, of the Record.)

The Plaintiff has become the owner and holder of ten of these bonds, and this action was brought by him in the Circuit Court of the United States for the Northern District of New York, to recover the principal and interest due thereon. (The declaration or complaint will be found at page 1 to 34 of the Record.)

The answer admitted the passage of the act of April 16, 1852, also the formation of the railroad company, and that the town of Venice is one of the towns of Cayuga County, but denies all the other allegations of the complaint. (Record, page 35, fol. 24.)

There are also various defences set up in the answer. They will be referred to under the various points to which they severally apply. The cause was tried at the Circuit Court, held at Canandaigua, in June, 1873, and plaintiff obtained a verdict for $15,626.

Upon this verdict a judgement was rendered, and a bill of exceptions was made by defendant and signed by the Justice before whom the cause was tried, and defendant brought the cause here by writ of error.

Various objections were made to the evidence offered by the plaintiff, and exceptions taken to the rulings of the Court thereon, and offers of evidence were made by the defendant, which being objected to, the objections were sustained and exceptions taken to the ruling of the Court thereon.

Exceptions were also taken to the charge of the Court to the jury, and also to the refusal to charge as requested by defendant's counsel.

I shall not here notice all these several questions in detail, as they all depend upon a few questions of construction which will be particularly noticed in the following Points.

The plaintiff proved:

1st. The act of the Legislature. (Page 39.)

2nd. The organization of the R. R. Co. (Record, page 39.)

3d. The filing by the Supervisor and Assessors of the assents of 259 of the resident tax-payers of the Town, together with the affidavit of the Supervisor and one of the Assessors endorsed thereon, as required by the 1st section of the act. (Record, page 40.)

4th. The election at the town meeting, held next after the passage of the act, and after the filing of said assents and affidavit, of a Supervisor and two Rail Road Commissioners for the town, as required by Sec. 10 of the act. (Record, page 39.)

5th. The signatures of said officers to the bonds and coupons counted upon. (Record, page 39.)

6th. Said bonds and coupons were thereupon read in evidence, and plaintiff proved the amount due thereon for principal and interest, and rested. (Record, page 43) A copy of one of the bonds and one of the coupons, will be found in the record page 46.

The defendant then made the following offers of proof.

1st. That five of the bonds were originally and in the first instance delivered to the R. R. Co. for stock, and not for money borrowed—which under objection was excluded, page 44.

2nd. That one Slocum Howland was the owner and holder of the same five bonds in 1854 and until September 1867, when he disposed of them, but not to the plaintiff—which upon objection was excluded, page 44.

3d. That said Howland commenced an action in the Supreme Court of the State of New York in 1858, to recover the interest then due on said bonds, which suit was discontinued—which upon objection was excluded, page 44.

4th. Counsel then insisted that if the proofs above offered were made, it would compel plaintiff to prove that he was a bona fide holder for value, and that under those circumstances, the mere production

of the bonds did not prove that fact—the Court decided otherwise, page 44.

5th. Defendant then offered to prove that some of the signatures to the assents were not genuine, and that others were duplicates, and that two-thirds of the tax-payers never in fact signed the assents—which upon objection was excluded, page 44.

6th. Defendant then insisted that the Town was not such a corporation as could be sued in the National Court—but the Court decided otherwise, page 45.

7th. Counsel for defendant then requested the Court to charge the jury that the plaintiff was not entitled to recover, which was refused, page 45.

8th. The Court charged the jury that the plaintiff was entitled to recover.

1st. The principal secured by said bonds.

2nd. Interest thereon from the first day of January 1873. That being the time when the last coupon became due.

3d. The amount of the several coupons which became due and payable within six years previous to the commencement of the suit and

4th. Interest upon the several coupons which had thus became due within the six years before the commencement of this suit, from the time they severally become due.

9th. Defendant's counsel duly excepted to the seperate portions of the charge, page 45.

The jury rendered their verdict for the plaintiff in accordance with the charge of the judge, page 45.

Defendant made bill of exceptions and the cause was brought to this Court by Writ of Error.

ARGUMENT FOR DEFENDANT IN ERROR.

FIRST.

The first question which I shall attempt to solve, is, was the plaintiff the bona-fide purchaser for value of the bonds in controversy, and before maturity.

The counsel for the plaintiff in error, insists that inasmuch as the defendant in error in his complaint alleges that he purchased the bonds "to *wit*: on the first day of August, one thousand eight hundred and sixty-seven," and that "said bonds, together with the coupons for the unpaid interest due and to grow due thereon, and thereto attached, were thereupon then and there delivered to him the said plaintiff," &c. (Record, page 4.) That therefore the fact is established that he became the owner of the bonds *after maturity*.

And although I do not deem that question of much importance, in view of the other facts in the case, yet as this question is practically the only ground upon which the counsel for the plaintiff in error bases the defence, I will examine that question first.

The facts *as proved* are as follows:

Defendant in error proved all the preliminary facts.

1st. By reading the act of the Legislature.

2nd. By proving the organization of the R. R. Co. (which bye the bye was admitted by the pleadings.)

3d. The filing of the assents together with the affidavit required by the 1st section of the act.

4th. The election of the Supervisor and R. R. Commissioners by the electors of the town, as required by the 10th section of the act, and

5th. That the signatures to the bonds and coupons were in the hand-writing of said Supervisor and Commissioners.

He then offered to read the bonds and coupons in evidence, to which the plaintiff in error objected for various reasons. See Record, page 38 to 42. All the objections however, were really based upon the assumption that the defendant in error became the owner of the bonds after maturity, and therefore was required to prove that the assents were genuine and

that the bonds were issued for monies actually borrowed.

Hence if this Court shall adjudge that the defendant in error by purchasing the bonds after some of the coupons had become due although before any of the principal was payable, became the holder and owner thereof before maturity, as understood by the law-merchant, then the whole superstructure of the defence fails.

I am aware that it has been held by one of the Justices of the Supreme Court of N. Y., at special term that where a promissory note was negotiated after an instalment of interest had become due, although beforeany part of the principal had matured, that the purchaser must be treated as the holder of dishonored paper. Newell vs Gregg, 51 Barbour, 263—which is the only authority cited by the counsel for the plaintiff in error in his brief. But in the brief in the case against the town of Genoa, the counsel cites upon this point, the case of Vinton vs. King (4 Allen, 562.) In that case a portion of the principal was past due, and the decision is placed upon the ground that the *first installment* was overdue, not one word is said in regard to the non-payment of the interest.

He also cites the case of Arents vs Commonwealth, (18 Gratt. 750,) but gives no synopsis of the case, nor have I seen the report of it. It is passing strange that no other decision upon this point except the special term decision in the case of Newell vs Gregg can be found, if that case is a true exposition of the mercantile law?

Counsel also cites the case of the Mayor vs Ray (19 Wallace, 468) upon examining that case, as reported, I do not find any such question in the case, nor were the facts in that case such as to render such a question possible.

The counsel also cites the case of County Lee vs Clews, not reported· That case I have not seen and cannot therefore say what was decided therein.

But in the case of Grand Chute vs Winegar (15 Wallace, 355) I do find that identical question decided by this Court.

In that case the bonds were issued in March 1855, with 15 coupons annexed for annual installments of

interest. Winegar purchased these bonds *with the coupons* in January 1870, after all the coupons, except the last had become due.

Under these circumstances Mr. Justice Hunt in giving the opinion of the Court says, (page 373.) "The plaintiff was the bona-fide holder for value of the bonds in suit, *and his title accrued before their maturity.*"

Hence I think I may safely assume that the defendant in error will be held by this Court, to have become the owner of these bonds before maturity, and if so no authority need be cited to prove that presumptively he acquired them for value in the ordinary course of business.

But I insist that the counsel is mistaken when he assumes that the allegation in the complaint above cited, establishes the fact, that defendant in error became the owner of the bonds on the day therein alleged.

1st. Because the time being alleged under a *videlicit*, the party was at liberty to prove the purchase on any other day precisely as he would have been had no day been alleged in the declaration.

2d. Because the plaintiff in error denied that part of the complaint in its first answer. (Record p. 35.) And see the provisions of the N. Y. code Sec. 168. The plaintiff in error cannot be permitted to put the defendant in error upon his proof of that fact and then to insist that the proof shall not have its legitimate effect.

When the parties came to the trial the defendant in error was compelled to prove his ownership of the bonds which he did by their production in court. When they were produced, being negotiable by the law-merchant, the legal presumption was that the party producing them became the owner bona fide and before maturity.

The plaintiff having alleged in its ninth answer "that at the time when the said plaintiff became the owner and holder and bearer of the said bonds and coupons, there was due and unpaid on each of said alleged bonds, with the coupons which were attached to the same respectively, a large sum of money, to wit: the sum of eight hundred dollars or

thereabouts, for interest then due and unpaid on said bonds and coupons ; and that the said plaintiff at the time when he became such owner, holder and bearer of said bonds and coupons well knew that said interest was due and unpaid on the same respectively, and that the said plaintiff became such owner, holder and bearer of said bonds and coupons respectively, not in the ordinary course of business, and without such knowledge as aforesaid, and without paying a bona fide and valuable consideration for the same, and with full knowledge of the original delivery of them to the said railroad company as aforesaid, and that the said plaintiff is not a bona-fide holder or bearer of them or any or either of them for a valuable consideration paid by him, and in the ordinary course of business." Record p. 37.

Under this state of the pleadings, the defendant below had the right to prove the facts alleged in this plea.

He offered to prove—

1st. That the bonds were delivered in the first instance to the railroad company for stock.

2d. That Slocum Howland, Esq., was the owner and holder of five of the bonds now in suit in 1854, and continued to be such owner and holder of them until about the first day of September, 1867, when he disposed of them, but not to this plaintiff.

3d. That said Howland commenced an action in the State Courts to recover interest then due in 1858 which suit was discontinued.

4th. That some of the signatures to the assents were not genuine and others were duplicates, and that in fact two-thirds of the tax-payers never signed the assents.

These offers were objected to and overruled, and counsel excepted.

And I will now assume that all these offers could have been proved, and I will treat the case as if they all were facts proven and properly in the record, and I shall still insist that the defendant in error appears as the bona-fide purchaser of all these bonds for value, and before maturity. Because

1st. There was no offer to prove that the defendant in error had any knowledge or notice sufficient

to put him upon enquiry in regard to any vice in the issuing or sale of these bonds.

2d. On the contrary he had a right to rely upon the affidavit of the agents of the town in regard to the genuineness of the assents and of the number of assentors.

3d. He had also the right to rely upon the recitals in the bonds, exclusive of the affidavit, in regard to the preliminary matters.

4th. The proof offered that five of the bonds were owned by Slocum Howland in 1854 had it been proved, would have raised the lega that said Howland was the bona-fide for value, and his title certainly ~~occur~~ turity, nor is there any allegation tl ment of interest remained due and unpaid when he became the owner. As was said by Mr. Justice Swayne in the case of National Bank of Washington vs. Texas (20 Wallace 90) "every holder is presumed to have acquired his title before the maturity of the instrument and bona-fide. The burthen of proof rests upon the party alleging the contrary." No reason is perceived why Mr. Howland should not have the benefit of this rule. Defendant in error had his, Mr. Howland's, title. Mr. Justice Swayne further said in the same case, speaking of subsequent holders, "each one takes the legal title and his equity is equal to that of his predecessors."

5th. If Mr. Howland disposed of these bonds to a bona-fide purchaser in 1867, which is the legal presumption, the defendant has a good title through that person. There is no allegation that either Howland or this other person, had any notice that the bonds were ever owned by the Railroad Co. No such proof could have been given as there was no such allegation in the pleadings.

I therefore insist that had all the offers been proven, the defendant in error had acquired an *unimpeachable* title.

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to put him upon enquiry in regard to any vice in the issuing or sale of these bonds.

2d. On the contrary he had a right to rely upon the affidavit of the agents of the town in regard to the genuineness of the assents and of the number of assentors.

3d. He had also the right to rely upon the recitals in the bonds, exclusive of the affidavit, in regard to the preliminary matters.

4th. The proof offered that five of the bonds were owned by Slocum Howland in 1854, had it been proved, would have raised the legal presumption that said Howland was the bona-fide owner thereof for value, and his title certainly ~~secured~~ accrued before maturity, nor is there any allegation that any instalment of interest remained due and unpaid when he became the owner. As was said by Mr. Justice Swayne in the case of National Bank of Washington vs. Texas (20 Wallace 90) "every holder is presumed to have acquired his title before the maturity of the instrument and bona-fide. The burthen of proof rests upon the party alleging the contrary." No reason is perceived why Mr. Howland should not have the benefit of this rule. Defendant in error had his, Mr. Howland's, title. Mr. Justice Swayne further said in the same case, speaking of subsequent holders, "each one takes the legal title and his equity is equal to that of his predecessors."

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I therefore insist that had all the offers been proven, the defendant in error had acquired an *unimpeachable* title.

SECOND.

I will now assume that five of these bonds were delivered in the first instance directly to the R. R. Co. for stock, and that the defendant in error is not entitled to be treated as the owner of negotiable paper purchased by him before maturity, and yet I insist that the town has no defense.

I. The delivery to the R. R. Co, was a good and valid delivery, and the R. R. Co. were entitled to be treated as bona-fide purchaser at par value. *There is no allegation in the pleadings, nor was there any offer to prove, that any officer of the R. R. Co. had any knowledge, notice, or reason to suspect, that all the preliminaries to the issuing of these bonds had not been fully and in good faith complied with.* Hence if the R. R. Co. could become the bona-fide owner of these bonds, it did become so.

The 2d section of the act authorized the Supervisor and Commissioners "on *obtaining and filing such* assents as provided in the first section, to subscribe for and take, in the name of, and for said town, such number of shares, of the capital stock of said company * * * as will be equal to the amount of *bonds executed* under the authority of this act," &c. It should be noticed here, that the Supervisor and Commissioners were not to defer the subscription for stock until the money *should be borrowed;* they were to subscribe for stock "to the amount of the *bonds executed.*"

Hence, it may be fairly assumed that when the assents and affidavits were filed, and the bonds were executed, the next thing done by the Supervisor and Commissioners was to subscribe for the stock.

Now I insist as between the R. R. Co. and the town, the affidavit of the town officers and the recitals in the bonds, were conclusive upon the question of the obtaining and filing the requisite assents, so far as to render the subscription for the stock valid, as the statute *directly* authorized the subscription to the *amount* of the bonds *executed*, without re-

ference to the amount which had, or might be borrowed by the sale of the bonds.

And I would here suggest that the R. R. Co. and the town were not the only parties then interested in this question. Whether or not these town subscriptions were made, would necessarily have great influence upon obtaining individual subscriptions for stock.

Now the stock having been subscribed for, the town was liable for the payment of the subscription, why not deliver the bonds directly to the R. R. Co. and thus cancel the indebtedness and save the trouble and expense of selling the bonds. The R. R. Co. was willing to take the bonds at par.

It is not suggested that they were worth any more.

If the money was borrowed, all the town could require was an equivalent amount of the stock of the R. R. Co, at par. That was obtained. All the R. R. Co. could obtain if the money was borrowed, was payment for the stock at par.

It is not suggested that the bonds were sold by the R. R. Company at less than par. Then who was injured?

The R. R. Co. obtained the money—and the town obtained the stock. If the tax-payers were dissatisfied, then was the time to complain, while the bonds were in the hands of the R. R. Co. The town could have tested the question in regard to the right to deliver them, by offering to return the stock, and demanding a redelivery of the bonds.

I will now endeavor to show that the delivery of the bonds, under the circumstances, was good and valid, and that the R. R. Co. acquired a good title thereto, as bona-fide purchaser, of negotiable commercial paper at its full par value.

This question came before this Court in the case of Seybert vs City of Pittsburgh (1 Wallace, 272.) In that case the act of the Legislature authorized the City to subscribe to the stock "*as fully as any individual.* But the act did not give the City any power to issue bonds in payment of its subscription. But the subscription having been made, the City issued bonds for the payment thereof, and this Court

held that it was authorized so to do, and that the bonds were valid.

I submit that in the case now before the Court, the authority of the agents of the town to make the subscription after the assents and affidavit were filed, was as full, as that of any individual, and I have already shown that the affidavit and the recitals in the bond were conclusive proof as between the town and the R. R. Co. in regard to that authority. I therefore insist that the case cited is a decision of this Court directly in point.

A similar question came before this Court in the case of Meyer vs The City of Muscatine (1 Wallace 384.) In that case the only authority claimed was to *borrow money*, &c. But the City there, as is alleged in this case, issued its bonds directly to the R. R. Co., and this Court held the bonds valid, although they were sold by the R. R. Cor to the plaintiff *at a price greatly below their par value*, which feature is not in this case. Justice Swayne in giving the opinion of the Court says: "The city was authorized to issue the bonds in order to borrow money to pay for the stock. If the company chose to receive the bonds in payment for the stock, retaining a lien on the stock until the bonds were paid, there was no legal obstacle in the way of their doing so. The object of issuing the bonds was thus accomplished and no injury was done to those who were to pay them. It is neither averred in the answer, nor claimed in the argument, that the railroad company took them at less than their face. It does not appear that any one objected then, and no one can object now."

A similar question came again before this Court in the case of Rogers vs Burlington (3 Wallace 654.) In that case the only authority claimed was to *borrow money* for a public purpose. But instead of issuing the bonds for *money borrowed*, the City issued its bonds and loaned them to the R. R. Co. to be sold by the company. The fact that the bonds were thus issued and loaned to the company appeared by an endorsement upon each bond to that effect, and hence every purchaser thereof, purchased with notice of that fact.

Mr Justice Clifford in delivering the opinion of the Court says :

"Common experience shows that the issuing of bonds by a municipal corporation as material aid in the construction of a railroad is merely a customary and convenient mode of borrowing money to accomplish the object, and it cannot make any difference so far as respects the present question whether the bonds issued by the defendant were sold in the market by their officers, or was first delivered to the company and were by their agents sold for the same purpose. Money was what the company wanted to be expended upon the construction of the rail road, and the bonds were issued by the defendant to enable the company to accomplish this purpose. Technically speaking it may be said that the transaction, as between the company and the defendant, was, in form, a contract of lending, but as between the defendant and the persons who purchased the bonds in the market, it was undeniably a contract of borrowing money ; and the same remark applies to the transaction in its practical and legal effect upon all subsequent holders of the securities who have since become such for value, and in the usual course of business." (Page 666.)

I therefore submit that this is no longer an open question in this court. But I am well aware that the counsel for the plaintiff in error will cite the decisions of the N. Y. Court of Appeals in the case of Starin vs. The Town of Genoa (23 N. Y. R. 439), and Gould vs. Town of Sterling (23 N. Y. R. 456), as establishing a contrary rule. But should the Court deem it necessary to examine these cases, it will be found that the facts in these cases differed widely from the facts in this case, if all the offers of proof made upon the trial by the plaintiff in error, the defendant below, be taken as true.

In the case of Starin vs. The Town of Genoa, (23 N. Y. 439), *it appears that the plaintiff purchased the bonds in suit in that action directly from the R. R. Co.*, and Judge Lott in his opinion says, speaking of the plaintiff, "He purchased these on which this action is brought, directly from the company, with full notice of the facts and circumstances under which they had been received. He is therefore not

a *bona-fide* holder of them, and the rights of the parties are to be determined in the same manner and on the same principles as if the company was seeking to collect them." (P. 455.)

No such facts were proved or were offered to be proved in this case. It is alleged in the ninth answer, that the plaintiff became the owner of the bonds in question "with full knowledge of the original delivery of them to the said Railroad Company as aforesaid." *But no proof was offered upon that subject.* In this respect the case now before this Court differs from the case of Starin vs. Genoa.

It will be perceived by reading the opinion of Judge Lott in the case of Starin vs. Genoa, that he held the plaintiff was not entitled to recover. Because

1st. He was bound to prove affirmatively that the necessary assents had been given.

2d. That the affidavit of the Supervisor and Assessor was *no proof whatever* of that fact.

3d. That the town officers had no authority to deliver the bonds to the Railroad Company.

How far the other members of the court agreed with him in these several propositions, I have no means of ascertaining.

The opinion of Mr. Justice Lott in the case of Starin vs Genoa, is also, I think, subject to a criticism which justly deprives it of all authority, in regard to the affidavit of the Supervisor and Assessors.

In that opinion Mr. Justice Lott refers to the decision of the Court of Appeals in the case of The Bank of Rome vs The Village of Rome (19 N. Y. R. 20,) and says that he has not over-looked, nor failed to give full effect to, the decision of the Court in that case. (Page 452.)

But upon carefully examining his opinion it will be found, that he supposed that the certificate which the Court in the Rome case held conclusive, was the certificate required by the 10th section of the Rome act nor does he in any wise refer to the certificate required by the 11th section of that act. In his opinion he quotes from the 10th section, that part which requires the President and Trustees upon counting the votes of the electors to certifiy the results; and also

that part of the 10th section which provides "and if it shall *appear from such certificate* that this act has been approved and the issue of stock authorized, the President and Trustees shall proceed to make subscriptions as authorized by this act" and he italicizes the words *appear from such certificate*, as I have done in the above quotation, and he further says:

"It will be seen from these provisions * * *

Court of Appeals, and in the finding of te refereeh as there printed I find the following :

"That on the fifth day January, 1854, the plaintiff purchased of said railroad company, eight of said bonds" &c.

"That the purchase price paid for said bonds by said plaintiff was at the rate of ninety per cent. upon their par value, and which was paid by him to said company, in part, by transfer of New York Central Rail Road bonds, at the rate of ninety-three per cent. of their par value, and the balance in cash."

Hence, the facts in that case differ from any proof given or offered in the case before the Court, in two very essential particulars, to wit :

In that case the plaintiff purchased the bonds directly from the R. R. Co. That is not alleged in this case either on the part of the plaintiff or Mr. Howland.

2d. The plaintiff purchased the bonds of the R. R. Co. at ninety per cent of their par value. No such fact is alleged in this case, *and it was upon that combination of facts that Judge Selden based the decision of the Court of Appeals in the case of Gould vs Sterling.* And I will quote what he says upon the subject. He first says:

"Instead of borrowing money, the Supervisor and Commissioners delivered over the bonds to the company in payment for stock, for which they were authorized by the act to subscribe *and the company sold them at a discount.* And he further says:

"The question is, whether this was within the authority confered by the act. It is clearly not within its language. No money was borrowed, and nothing else was authorized by the terms of the act." But he adds, "*if however what was done, was the same in effect, as if the money had been borrowed, and paid over to the Railroad Compony, the difference in form would not be material.* But it is plain that neither in respect to the Railroad Company nor the town was the effect the same. If the statute had been pursued the company would have had a sum equal to the par value of the bonds, to expend upon their road, *as it was they were compelled to sell the bonds at a discount, in order to realize the money.*"

But as I before said, these, which were the controlling facts in the cases of Starin vs. Genoa and Gould vs. Sterling, to wit: The purchase by the plaintiff directly from the Railroad Company and below par, is not even suggested as belonging to the case now before this court.

In the subsequent case of The People vs. Mead, when first before the N. Y. Court of Appeals (24 N. Y. R. 114), it appeared that the bonds were delivered to the Railroad Company and sold by a broker employed by the Company, to the plaintiff at eighty per cent.

But the question in regard to the right of the town officers to deliver the bonds directly to the Railroad Company does not appear to have been passed upon by the Court, as Judge Denio at the conclusion of his opinion says: "I must vote for affirming the judgment of the Supreme Court. A number of the Judges, however, sufficient to pronounce a judgment, are in favor of reversal *on the single ground* that it was not shown that two-thirds of the resident tax-payers of the town had signed the written assent, and that the affidavit does not supply the defect of proof." P. 127, 128.

This case of The People vs. Mead came again before the Court of Appeals (36 N. Y. R. 224), and Judge Davies who gave the opinion of the Court, states the same as the ground of the judgment, to wit: that the affidavit did not supply the necessary proof of the assents. (P. 225.)

Thus it will be seen that the N. Y. Court of Appeals never has decided that the town officers acting under this statute had not the right to deliver the bonds directly to the Railroad Company in payment for the stock authorized to be subscribed for and taken. The utmost which can be claimed is, that where the bonds were delivered to the Railroad Company and *sold by the company at a discount, the person thus purchasing at a discount could not recover.* That question is not now before this Court, hence there is no conflict between this court and the N. Y. Court of Appeals upon that subject.

Were an individual to make such a plea, no counsel would presume to ask any court to sustain such

a defense. A mere statement of the case ought to be sufficient to convince any one of its unworthiness. The town was authorized to issue its bonds to borrow money thereon, and to pay it over to a Railroad Company in payment for the stock of the company. The bonds were issued, but instead of borrowing the money thereon, the authorized agents of the town delivered the bonds directly to the Railroad Co., and received the stock therefor. The Railroad Co. sold the bonds at par, the town refused to pay, still retaining the bonds, and the court is asked to decide that this is a good defense, and in this case the court is asked to go a step further and to decide that one who purchased the bonds without any notice that they were ever in the hands of the Railroad Co., shall be *presumed* to be cognizant of that fact!

After this argument was printed, a copy of the opinion of the N. Y. Court of Appeals, in the case of the town of Venice applt ag'st Charles H. Breed, executor, et. al. respondents, decided at the present term of that Court was received.

That was an equitable action, brought in the Supreme Court, by the town against several persons, each of whom were alleged to be the holders severally and not jointly of the bonds of that town, claiming that the bonds were void, because issued without first obtaining the assents of two-thirds of the tax-payers, and also, as to twenty of the bonds, that they were delivered in the first instance to the R. R. Co., for stock, and praying for an injunction to prevent the defendants from parting with their bonds, and for a decree compelling them to cancel them.

The cause was tried before a referee, who ordered judgment dismissing the complaint with costs as to five of the defendants. The plaintiff appealed to the General Term, where the judgments as to those defendants were affirmed, an appeal was then taken by the town to the Court of Appeals, where the judgment of the General Term was affirmed.

In the opinion by judge Rapallo, speaking for the Court, he says: "The fact that twenty of the bonds were delivered directly to the R. R. Co., instead of being sold by the Rail Road Commissioners, is relied upon as a ground for granting relief as to those bonds. In the case of People vs Mead, (24 N. Y. 124, 125,) it seems to be considered that this fact would not constitute a defense, even in the State Courts, as against a *bona-fide* holder of the bonds."

that by the true construction of the act, the agents of the town had no authority to issue the bonds except for money *actually borrowed* by them. If that be admitted, then I think it is very evident that the

town is estopped by the acts of its agents from insisting upon any such defense.

I will test this question by reference to the decisions of the Courts of New York, including the Court of Appeals.

In the case of the North River Bank vs Aymor, (3 Hills 362). The Court adopting the language of the counsel who argued that case on the part of the plaintiff, say, that "whenever the very act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent, with the words of the power, the act is in itself warranted by the terms used, such act is binding upon the constituent, as to all persons dealing in good faith with the agent—such persons are not bound to enquire into facts *aliunde*. The apparent authority is the real authority." This language was applied to the case of a note made by an attorney acting under a written power of attorney, which authorized him to sign notes, &c., for the principal, and he signed the note in suit and transferred it, not for the use or benefit of the principal, and it was held that the principal was estopped from proving that the note was not made and used for his benefit.

Now apply that principle to these bonds, assuming that the counsel for the plaintiff in error, are correct in their construction of the statute, and that the only authority of the town, was, to execute and deliver these bonds, for *money borrowed*. Then, I submit, the very act of issuing the bonds, was, in and of itself, a representation by these agents of the town that they were thus issued, and upon no other consideration. That was the *apparent* authority, and the Court say, in the case cited. "The apparent authority is the real authority."

This, it is true, was but the decision of the Supreme Court, but it was afterwards *fully* adopted by the Court of Appeals, in several cases.

In the case of The Farmers and Mechanics Bank vs Butchers and Drovers Bank. (16 N. Y. 142.)

In the case of Griswold vs. Haven. (25 N. Y. R. 598,) and again, after a most through and exhaustive examination of the question, in the case of the N. Y. and N. H. R. R. Co. vs. Schuyler et. al. (34 N. Y. R. 30.) In which all the previous decisions of

THIRD.

The defendant is estopped from proving that the bonds were delivered to the R. R. Co., in the first instance; if such delivery was not in acordance with the provisions of the act.

The several counsel for the plaintiff in error, insist that by the true construction of the act, the agents of the town had no authority to issue the bonds except for money *actually borrowed* by them. If that be admitted, then I think it is very evident that the

town is estopped by the acts of its agents from insisting upon any such defense.

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Now apply that principle to these bonds, assuming that the counsel for the plaintiff in error, are correct in their construction of the statute, and that the only authority of the town, was, to execute and deliver these bonds, for *money borrowed*. Then, I submit, the very act of issuing the bonds, was, in and of itself, a representation by these agents of the town that they were thus issued, and upon no other consideration. That was the *apparent* authority, and the Court say, in the case cited. "The apparent authority is the real authority."

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the New York Courts, were thoroughly examined and criticised. In that case speaking of the several cases above cited, it is said. "In each of these cases, the extrinsic fact which constituted the condition of the authority, was peculiarly within the agents knowledge, and *was necessarily represented to exist by the execution of the agents powers.* It might or it might not be discovered by inquiry," and farther, "These facts are wholly extrinsic, and peculiarly within the knowledge of the agent, as part of the special duties to be attended to by him, *and were represented by him to exist by the certificate itself.*"

The same question was again before the Court of Appeals in the case of the President, &c., of the Westfield Bank vs. Corner. (37 N. Y. R. 320.) In that case the suit was brought upon a note made by an agent, under a power of attorney authorizing the agent to sign notes, &c., *in conducting the business of the principal*, but the note was in fact used for the benefit of other parties. In the opinion, delivered by Mr. Justice Parker it is said: "The note being negotiable, the maker is deemed in law to enter into a contract with every one to whom it is afterwards negotiated, so that the plaintiffs thus stand in privity with the defendant, and are, within the rule, dealing in good faith with the agent *notwithstanding the payees and their immediate endorsers had notice that* the agent was transcending his authority, in making the note."

I therefore submit, that when Mr. Howland received these bonds, he being a bona-fide purchaser, which is to be presumed, as there is no allegation to the contrary; he was authorized to rely upon the fact, that the agents of the town having issued these bonds under the authority of the statute by which they were authorized to issue them for borrowed money only, that therefore they had thus issued them and upon no other consideration.

Because, as was decided in the case of the N. Y. and N. H. R. R. Co. vs. Schuyler et. al. This fact was wholly extrinsic and peculiarly within the knowledge of the agents, as part of the special duties to be attended to by them, *and were represented by them* to exist *by the execution of the bonds*, and putting them upon the market.

FOURTH.

The town was estopped from making any proof in regard to the insufficiency of the assents, as against the defendant in error, inasmuch as he derived his title, through a bona-fide holder who obtained them before maturity. (Mr. Howland.)

It is true that the agents of the town were prohibited from doing any act, (which of course included the issuing of the bonds) until the requisite number of assents had been procured and filed, together with the affidavit of the Supervisor and Assessors or any two of them to the effect that the persons whose written assents were thereto attached and filed comprized two-thirds of all the resident tax-payers of said town on its assessment roll next previous thereto.

Assents containing the names of a large number of persons, styling themselves "*resident tax-payers of the town of Venice*" had been filed. *Thereto attached and filed therewith*, was the affidavit required by the Statue.

The bonds contained recitals as follows:

1st. "Be it known, that the town of Venice, in the County of Cayuga and State of New York, in pursuance of an act of the Legislature of the said State, entitled: "An act to authorize any town in the County of Cayuga to borrow money for aiding in the construction, of a rail road or rail roads, from Lake Ontario to The New York and Erie, or Cayuga and Susquehanna Railroad," passed April 16th, 1852, and for the purpose of aiding the construction of the Lake Ontario, Auburn and New York Railroad, owes," &c., and

2d. "In testimony whereof, the Supervisor and Commissioners of the town of Venice have *pursuant to the provisions of the act aforesaid, and the written assents of two-thirds of the resident tax-payers of said town, obtained and filed in the office of the Clerk of the County of Cayuga, hereunto subscribed their names*," &c.

It will be unnecessary to cite many authorities to this Court, to prove that by the settled rules of law, as settled by this Court, as well these recitals as also the affidavit, are each conclusive as against the town in favor of any bona-fide holder of the bonds, and I think I have shown in my *second* point, that such is now the rule as applied by the Courts of New York.

I will however refer to the case of Kenicott vs the Supervisors (16 Wallace, 464) and to the case of Chambers County vs Clews (21 Wallace, 321.) In which Mr. Justice Hunt in giving the opinion of the Court says, "we have held many times, in relation to the bonds of this character, that *where the persons appointed by law* to certify that the preliminary requisites have been complied with, do so certify, that their certificate is conclusive in favor of the holder, who, on the strength of such certificate, pays his money for the bonds without notice of the defect or irregularity." Upon each of these bonds was endorsed the certificate of the County Clerk of Cayuga County "that a paper purporting to be the written assents of two-thirds of the resident tax payers of the town of Venice, with the affidavit required by Sec. 1 of the act referred to by its title in the foregoing bonds, has been filed in this office." and the plaintiff below produced the affidavit upon the trial. (Record, p. 40.)

The only remaining question would then seem to be were these persons who made this affidavit, persons *appointed by law* to make this sworn certificate.

By Sec. 1 of the act, the assessors of the town "*are appointed* by this act as Commissioners to act in conjunction with the said supervisor in effecting and executing this act." But they were not to act until a Rail Road Company had been duly organized, "and the written assents of two-thirds of the resident persons taxed in said town, as appearing on the asessment roll of such town next previous to the time such money may be borrowed, shall have been obtained *by such Supervisor and Commissioners, or some one or more of them*, and filed in the Clerks office of Cayuga County, together with the affidavit of such Supervisor or Commissioners, or any two of them, attached to such statement, to the effect that

the persons whose written assents are thereto attached and filed as aforesaid, comprize two-thirds of all the resident tax-payers of said town on its asessment roll next previous thereto."

That the Legislature had the authority to name the persons or officers who should thus act for and conclusively bind the town by their certificate, was decided by the N. Y. Court of Appeals in the case of The Bank of Rome vs The Village of Rome (19 N Y. R. 20.) In that case the Legislature named the Commissioners, in the 3rd section of the act; and the Court held that the certificate of the persons thus named as Commissioners by the Legislature, was conclusive upon the village. I am not aware of any case reported in which that decision has been ever critizied

I admit that the N. Y. Court of Appeals afterward in the case of Starin vs Genoa, made a decision in conflict with this decision in the Rome case, in regard to the effect of the affidavit. But I have shown on page 16 of this brief, that Judge Lott who gave the opinion of the Court in that case was entirely mistaken in regard to the question which was decided in the Rome case. I am also aware the N. Y. Court of Appeals in the case of The People vs Mead, (24 N. Y. R. 114,) by a majority vote, and against the opinion of Judge Denio (which by the way was the only opinion reported) followed the ruling upon that subject as made in the case of Starin vs Genoa, Judge Denio claiming that the decision in the case of Starin vs Genoa had been made "upon the ground that the bonds were not issued upon a loan, and that the plaintiff was not a *bona-fide* holder of the paper so as to claim a better right than the R. R. Co. had. (Page 127.) But he was out-voted, no one of the majority, however, so far as appears, having given any reasons for his opinion. And when this case of The People vs Meadcame again before the Court of Appeals. (36 N. Y.R. 224.)

Judge Davies saying in his opinion: "We do not think it seemly to review and reverse the former judgement of this Court in this action, upon the same facts"—and Judge Grover in his opinion saying: "But for the previous adjudications of this Court I should have held that the affidavit filed with

the Clerk of Cayuga County pursuant to the second section of chapter 375, of Laws of 1852, was conclusive evidence of the assents of the tax-payers of the town required by the act in favor of a bona-fide holder of bonds issued under its provisions" &c.

But I submit that the decision in these cases, of Starin vs Genoa and The People vs Mead, will not be followed by this Court, against its repeated decision to the contrary; and particularly inasmuch as these decisions if followed, overrules the decision of the same Court of Appeals as declared in the case of The Bank of Rome vs The Village of Rome. (19 N. Y. R. 20.)

The Courts of the States have no better authority to impair the obligation of contracts by their decisions, than have the Legislatures of the States by their enactment. Gelpecke vs City of Dubuque. (1 Wallace 175.) The City vs Lamson. (9 Wallace, 478. Olcott vs The Supervisors. (16 Wallace, 690.) And I further submit that the rulings of the majority in the cases of Starin vs Genoa and The People vs Mead, have been effectually overruled, and the law settled otherwise in the case of The N. Y. and N. H. R. R. R. Co. vs Schuyler et. al. (34 N. Y. R. 30.) Wherein it was held that the certificate of the agent of the R. R. Co. although false, in relation to a matter apparently within his authority, estopped his principal from proving to the contray, which was followed in the case of Westfield Bank vs Corner. (39. N. Y. R. 320,) and the rulings of the Court in the case of the North River Bank vs Aymor and in the case of the Bank of Rome vs The Village of Rome was reestablished as the *settled* law of the State of New York, nor can the rulings in the case of Starin vs Genoa and The People vs Mead by any sophistry, be made to agree therewith.

FIFTH.

But the question of estoppel of the principal by the declaration of the agent is applied independent of the commercial law, and a purchaser of the bonds whether purchased before or after maturity, may, as against the town confidently rely upon the recitals therein and upon the affidavit of the agents of the town against any offer to prove the recitals or affidavit false. (There being no claim that either was fraudulently made.)

Mr. Justice Davis in giving the opinion of the Court in the case of the N. Y. and N. H. R. R. Co., vs. Schuyler, (34. N. Y. p. 72,) says: "It is a mistake to suppose that the conventional rule of commercial negotiability has any thing to do with this question except in cases where the paper carries no notice on its face that it is made by somebody assuming to be an agent. That rule stands upon an arbitrary doctine of the law merchant and not at all upon any principal of estoppel. It extends only to instruments which usage or legislation has brought within it, and its substance is, that by force of the arbitrary rule the possessor of such negotiable instrument has power to give by delivery to a bona-fide purchaser for value, a good title notwithstanding any defectiveness in his own. Hence a finder or a thief may confer such title with none in himself; not because the loser is estopped by his misfortune from asserting his rights, but because from real or supposed commercial necessities" *ita lex est scripta.*"

The recitals in these bonds, the affidavit of the agents of the town, the County Clerks certificate which was endorsed upon each of the bonds, spoke the same language, was just as persuasive, and carried the same conviction to the mind of a purchaser after some of the interest coupons had become due, as before. These were continued representations, intended to operate so long as those bonds remained unpaid, without any reference to the time of

negotiation; and added and was intended to add to the market value of the bond, as well after as before the interest coupons should become due, and it would be equally unjust that the principal should be allowed to contradict them after as before. They were, and were intended to be, continuing representations, to *all whom it might concern*. As was said by Parker J. in giving the opinion of the Court, in the case of the President, &c., of the Westfield Bank vs. Corner, (37 N. Y. R. 322,) speaking of a note which was made by an agent.

"The note being negotiable, the maker is deemed in law to enter into a contract with every one to whom it is afterwards negotiated, so that the plaintiffs thus stand in privity with the defendant, and are within the rule, dealing in good faith with the agent, notwithstanding the payees and their immediate endorsers had noticed that the agent was transcending his authority in making the note."

See Holbrook vs. N. J. Zinc Co., 57 N. Y. R. 616.

This question of estoppel has precisely the same application, whether applied to commercial paper, to Bonds and Mortgages or any other assignable securities, and irrespective of the question of the maturity of the paper.

Thus in the case of St. John vs. Roberts et. al. (31 N. Y. R. 441,) where a promissory note was sold at auction, by a broker acting for the endorser after it had been dishonered the endorsement upon the note not being cancelled, the endorser was held estopped from insisting that the purchaser was required to prove presentment and protest afte his purchase, nor was he restricted in his recovery to the amount paid for the note, but was held entitled to recover the full amount. And in the case of Foster vs. Newland (21 Wend 96,) where one took an assignment of a debt upon the faith in what the debetor said, he, the debetor, was held to be estopped to impeach the debt by set off or payment. And see Petrie vs. Feeter (21 Wend 173,) and where the obligee in a bond consented to its assignment, it was held that he was estopped from making any equitable defense.

L'Amoreaux vs. Vischer, (2 N. Y. R. 278.) And where a mortgagor assured one who comtemplated purchasing the mortgage, that all was right;

It was held that he was estopped from proving that the mortgage was obtained by fraud, and one who executed an undertaking was held to be estopped from contradicting its recitals to defeat the instrument. Coleman vs. Bean, (14 Abbott's Pr. Rep. 38,) where many cases are cited. See also the same case in the Court of Appeals, (3 Keyes 94). Also Fake vs. Whipple (39 Barb 339.) Jarvis vs. Sewall (40 Barb. 449,) and the case of the Continental National Bank vs. the National Bank of the Commonwealth, (50 N. Y. R. 575,) for a full and clear statement of the law of estoppel. (a) I submit that the rights of the holders of these bonds, if purchased after maturity, stand precisely in the same condition in regard to this question of estoppel as against the town, as if the bonds never had been negotiable under the law merchant, *and the material question is, were the representations made to the present holder before he acquired his title*, and was it calculated and intended to influence *him* in taking or rejecting the security. No good reason is perceived why one individual may cheat and deceive another, merely because that other person consents to receive paper which is past due.

Suppose these bonds had been executed by an individual, and he should have made the same affidavit, the same recitals and caused the same clerks certificate to be endorsed upon each bond, and he were afterwards sued upon them, could he be heard to say after thus inducing the party to purchase or receive them, that he had committed both fraud and perjury when he made the representations and verified the affidavit?

If not, this corporation cannot, for it is assumed, that although a corporation may be soulless, yet, they are not therefore absolved, as between themselves and those who deal with them, relying upon the representations and sworn statements of their authorized agents, when speaking or deposing in regard to a subject matter which was specifically entrusted to them by the tax-payer, by their election, from the ordinary rules which govern mortals in their dealings with each other.

I submit that it is time these tax-payers, who compose this corporation should know that they

(a) In the case of Mullen vs. Pondir (55 N. Y. 332,) Allen J., in giving the opinion of the Court of Appeals, referring to negotiable paper, not purchased in the usual course of business, says:

"But if any circumstances are wanting, which go to make up this perfect title, a purchaser or *transferee* of commercial paper takes it subject to the same rules which control in the case of a transfer or assignment of non-negotiable instruments," and on p. 334, he says:

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I only ask that this rule as thus firmly settled by the highest Court of the State of New York, shall be applied to this case. I do not understand that there is any discrepancy between the rulings of this Court, and those of the Court of Appeals of New York, upon this subject of estoppel, whether applied to the declarations or statements, written or oral of a party, or of an authorized agent.

are bound to the same rules of good faith when they elect officers to represent them in this matter, as they would be, had each individual given his individual bond containing the same recitals, and had each individual made the like affidavit. That they cannot thus elect their representatives, allow them to act in their name, procure the stock of the R. R. Co., by issuing their bonds therefor, retain the stock, and when asked for payment, whether by one who received the bonds, before or after some of the interest coupons became due, to answer, why our representatives committed both fraud and perjury when they purchased the R. R. stock with our bonds, and although we took the risk as to the value of the stock, and have allowed the bonds to remain in the market for more than twenty years, yet we will not pay them, because you should not have trusted to the representations and sworn statements, of those whom we elected to make them.

That may be the law, but it has not yet been so declared by this court.

SIXTH.

Has the defendant in error, recovered the proper amount?

The Court charged the jury, "that upon the above proof, plaintiff was entitled to recover the principal secured to be paid by said several bonds, together

with interest thereon from the first day of January one thousand eight hundred and seventy-three to the time of trial together with the amounts specified in the several coupons which became due and payable within six years previous to the commencement of this suit, together with interest upon said several coupons from the times the monies thereon severlly became due and payable to the time of trial," (record p. 45.) To this charge council for plaintiff below excepted, and requested the Court to charge the jury, "thatsaid plaintiff was entitled to recover the principal monies secured by said several bonds, together with simple interest thereon from the first day of July one thousand eight hundred and fifty-six to the time of trial," which was refused and counsel for defendant in error excepted. (Record p. 45.)

The counsel for the defendant below, then excepted to so much of said charge whereby the said Judge charged the jury that the said plaintiff was entitled to recover the principal secured to be paid by said several bonds, together with the interest thereon, from the first day of January one thousand eight hundred and seventy-three, to the time of trial.

Having failed to pay the bonds when due, interest followed as damages as a matter of law.

Counsel for the defendant below also excepted to that part of the charge to the jury "that the plaintiff was entitled to interest upon said several coupons, &c." As that question has been settled both by this Court and the Courts of New York, no argument is necessary; but I submit the Court erred in refusing to charge that the plaintiff below was entitled to simple interest upon the bonds, upon surrending the coupons, from the time the last coupon which was paid, became due.

No exception was taken to the charge of the Court, that the plaintiff below was entitled to recover the principal mentioned in the several coupons.

SEVENTH.

It is argued by one of the counsel for plaintiff in error, to use his own language, that "It is a well established rule of law, in relation to commercial paper, that if fraud or illegality, in the inception of a bill, note or bond, or in the circumstances under which it was taken *by the person who endorsed it to the plaintiff*, is proved, there arises a legal presumption that it was transferred without consideration, which presumption the plaintiff is bound to rebut by proof that he paid value for it." (See brief of Mr. Comstock, p. 66.)

As I understand the language of the opinion given in the case of Vermilyea & Co. vs. Adams Express Co. (21 Wallace 138,) the rule in this Court is not quite so broad as stated by the counsel. In that case the bonds had been stolen from the safe of the Express Company, and sold, (presumptively by the thief) to the plaintiffs in error, after maturity. The Express Company had given notice of the theft, and of the number of the bonds, to the plaintiffs in error, before they purchased the bonds. Mr. Justice Miller in giving the opinion of the Court in that case speaking of the purchase by Bankers, (p. 146.) says, " by the well settled law of the case they may purchase such paper before due without encumbering their minds or their offices with the memoranda of such notices. But we apprehend that the amount of overdue paper presented for negotiation is not so large as that Bankers receiving notice of loss cannot make or keep a book or other form of reference which will enable them with a very little trouble to ascertain when overdue paper is presented whether they have been served with notice of a claim adverse to the party presenting it."

From this I should infer the rule of law, as settled by this Court, to be

1st. Where such paper is negotiated before maturity, the purchaser obtains a good title, although purchased of the thief.

2d. Where such paper is purchased after due, the purchaser *prima-facia* has a good title, subject to proof on *the part of the alleged true owner*, that he had sufficient notice at least to put him upon enquiry as to the title of the vendor, and that such is the rule in New York. See James vs. Chambers, (6 N. Y. R. 209), where it is said "the general rule is * * * * that the possession of the note by the plaintiff at the trial, is prima-facia evidence of title, proof that he purchased or received it after maturity would have no other effect than to let in a defense as against the party *from whom he received it*, or if *the payee did not transfer it until after it was due*, against any previous holder."

But were the rule as stated by the counsel for the plaintiff in error, it could have no application to this case, for several reasons.

1st. It is not alleged that the *person who indorsed it to the plaintiff*, obtained it fraudulently or had any notice of any such fraud by others.

2d. It is not alleged that the defendant in error had notice of any defect in the issuing of the paper.

3d. It is alleged that five of these bonds, were owned by Mr. Howland as early as 1854, and it is not alleged that he had any notice of any fraud or illegality.

4th. There has been no allegation of fraud on the part of *any* holder of these bonds. No such allegation is made even in regard to any officer of the R. R. Co.

5th. There is no allegation that these bonds were issued *contrary* to the provisions of any statute, when the Courts speak of allowing a defense where the paper has been *illegally* issued, the term *illegal*, as thus used, is intended to apply to cases where the paper has been issued *contrary* to *some statutory* prohibition, as for a gambling debt, or against the statute of usury which declares the security absolutely void. Nor can the term be so extended as to include an honest mistake, made by the party receiving the security, in regard to the legal construction of any particular statute, where the maker re-

ceives the full consideration, and all that was contemplated when the security was authorized to be executed, as was *confessedly* the fact in this case. The town received the par value of the bonds in the stock of the R. R. Co. and kept it too, nothing more could have been obtained. That was all that was contemplated by the statute.

In this case there is not the slightest allusion to any *fraudulent* intention on the part of any one, in any pleading in the cause.

I therefore submit, if the rule were as stated by the counsel in his brief in this case, it could have no application to the case before the Court.

EIGHTH.

One of the counsel for the plaintiff in error (Mr. Comstock), now insists that the assents were not in the form required by the act; Because *the* Rail Road Co., to which the money should be paid, was not sufficiently expressed therein.

The act provides, that "all monies borrowed under the authority of this act, shall be paid over to the President and Directors of such Rail Road Company (now organized, or such as may be organized according to the provisions of the general rail-road

law, passed April 2, 1850.) As may be expressed by the written assents of two-thirds of the resident taxpayers of the town, to be expended by such President and Directors, in grading, constructing and maintaining a rail road or rail roads passing through the city of Auburn, and connecting Lake Ontario with the Susquehannah and Cayuga Railroad, *or* the New York and Erie Railroad."

The 2d section authorizes a subscription to "the capital stock *of such company as shall or may be organized for the purpose of constructing the aforesaid described railroad or railroads.*"

The complaint alleged, "that a Railroad Company, to wit, the Lake Ontario, Auburn and New York Railroad Company, was afterwards duly organized, to wit, on the 23d day of August, 1852, according to the provisions of the general railroad law of the state of New York, for the purpose of constructing a railroad passing through the said city of Auburn and the said town of Venice, and connecting Lake Ontario with the Susquehannah and Cayuga Rail Road." Record p. 2.

This was admitted in the *First* answer, as follows: "It also admits the formation of the Ruilroad Company mentioned and referred to in said complaint." Record p. 35, and on the trial a certified copy of the articles of association of that Railroad Company was produced. (Record p. 39.) The objection now taken was not mentioned upon the trial, or we could have proved that there was but the one R. R. Co., organized for the purpose of constructing any R. R. from Lake Ontario passing through the city of Auburn, and that that was *the* Rail Road *expressed* in the assents. A particular rail road, may fairly said to be *expressed* by the designation of its route, when but one was organized to occupy that route.

I submit therefore,

1st. The objection not having been taken upon the trial cannot be made in this Court for the first time, and

2d. That *the* Railroad Company *is* sufficiently *expressed* in the assents.

NINTH.

A point is now made that the bonds were void because the first instalment of interest was payable in less than six months after the date of said bonds. (Record p 42.)

The act (sec. 1.) provides, that *the rate* of interest shall not exceed seven per cent, per annum, which "shall be made payable annually or semi-annually," and the principal *and interest* shall be made payable "in such sums and at *such times* and place as shall be agreed upon and expressed in the bonds," &c.

The bonds bear date March 2d, 1853, payable on the first day of January, 1873, "with interest at the rate of seven per cent, payable semi-annually, on the first days of January and July in each year on the surrender of the coupons hereto attached." There were no coupons attached to those bonds when they were presented on the trial, earlier than those which became due on the first day of July, 1856. Nor was any proof offered to show that any coupons ever were attached for the payment of interest on the first day of July, 1853. Hence the record does not contain the proof of any fact, to sustain the exception.

But, in view of the fact, that the first meeting of the Board of Supervisors which could lay a tax upon the town to pay any interest upon these bonds, would not meet until November, it would seem reasonable to suppose that the first interest coupon would probably become due January 1st, 1854. It is very certain that no interest would be received by any bond holder until after the first of January, 1854, inasmuch as the taxes were not collected and paid over to the County Treasurer until February. Nor were the Board of Supervisors authorized to levy any tax to pay interest upon any such coupon had it been attached to the bond.

By sec. 4, of the act, the Board of Supervisors were required to cause to be levied, "a sum equal to the interest due or to become due *on the bonds*

executed," &c., which was directed to be paid to the County Treasurer, and by him to the Supervisor and Commissioners within twenty days after receipt thereof by him, and by them to be paid "on the bonds of said town executed under this act, in payment *of the interest thereon*, that shall then have accrued, or as the same may accrue."

Hence had a coupon for interest due July 1st, 1853, been attached to each bond, it would have been a harmless performance, inasmuch as it could not have been paid until long after the first of January, 1854, and then without interest thereon.

TENTH.

The counsel for the plaintiff in error insisted upon the trial that the Circuit Court had no jurisdiction, because the "town was not such a corporation as made it a citizen of the state of New York, but was a part and portion of the machinery of the

state government and not a citizen of the state, and that the Circuit Court had no jurisdiction over it." The Court ruled otherwise and the exception thereto forms the 21st exception of the bill of exceptions. (Record p. 44 and 45.)

The defendant is one of the towns of the County of Cayuga in the state of New York. The Revised Statutes of N. Y. (1 R. S. 337, Sec 1,) provides that "Each town, as a body corporate, has capacity,"

"1st, To sue and be sued, in the manner prescribed in the laws of this state."

"3d. To make such contracts, and to purchase and hold such personal property, as may be necessary to the exercise of its corporate or administrative powers."

And this Court decided in the case of Railway Company vs. Whilton's Administrators, (13 Wallace 270,) that a corporation would be considered a citizen of the state where it was created, within the clause extending the judicial power of the United States to controversies between citizens of different states.

And this Court has decided causes almost innumerable wherein, Counties, Cities and Towns have been parties.

LASTLY.

I submit that the judgment below, should be affirmed with costs, and with ten per cent demages for the delay.

There was no question made upon the trial, which had not been decided by this Court repeatedly.

After the defendant below had offered to prove, that Mr. Slocum Howland was the owner of these bonds in 1854, and continued to own the same until 1867, thus himself assuming that they had been in the possession of a bona-fide owner before maturity, from whom the plaintiff below must necessarily have derived his title, there could be no defence by reason of any thing which was proved or offered to be proved by the defendant below, and therefore I ask on behalf of this bond holder, that he shall be, at least in some measure, reimbursed for his expenses incurred by reason of this vexatious and unnecessary litigation.

D. WRIGHT, Att'y.
and of Counsel for Def't in Error.

Auburn, N. Y., September, 1875.

Supreme Court of the United States.

THE TOWN OF VENICE, *Plaintiff in Error,* *vs.* EVANDER MURDOCK, *Defendant in Error.*	*No.* 53.

SUPPLEMENTAL BRIEF IN BEHALF OF DEFENDANT IN ERROR.

The affidavit of the Supervisor and Assessors was the judgment of officers acting judicially, and is therefore conclusive, and cannot be attacked collaterally.

The rule of law is uniform, that where officers are clothed with judicial power, their decisions, so long as they act within their jurisdiction, are as conclusive, when attacked collaterally, as those of any other court, however high, no matter how inferior in rank they may stand.

Hence, all that is necessary in this case, to establish the conclusiveness of this affidavit, is to show:

1. That the jurisdiction to ascertain and decide the fact, whether or not the number of assenting tax-payers constituted two-thirds of those upon the assessment roll, and to render judgment in regard thereto, was conferred upon them.

2. That they did adjudge and decide that question.

3. That they declared their judgment in the form prescribed by the act.

I will endeavor to establish these three propositions; and

1. The act of the Legislature expressly conferred that jurisdiction upon them. By the last clause of the first section of the act, *they, or some one or more* of them, were authorized to obtain the assents of the tax-payers.

2. They, *or any two of them*, were authorized by the same last clause of the first section, to make an affidavit, which must be attached to the assents and filed therewith, "to the effect that the persons whose written assents are thereunto attached and filed, as aforesaid, comprise two-thirds of the resident tax-payers of said town, on its assessment roll, next previous thereto."

It would be difficult to frame a provision more plainly and effectively, giving them jurisdiction to act in regard to the subject matter.

3. That they accepted the jurisdiction, procured the assents, and did adjudge that those assenting comprised two-thirds of the resident tax-payers of said town, on its assessment roll, next previous thereto, is evidenced by the affidavit, which will be found on page 40 of the record.

4. And that they declared their judgment in the form required by the statute, will also be seen by reference to the affidavit.

Having been thus clothed by the Legislature, with ju-

risdiction over the subject matter; having exercised that jurisdiction, and having declared the result in the manner prescribed by the statute, it is submitted, that the only manner in which their judgment could be attacked or impugned, was, by a direct proceeding by Writ of Certiorari, issuing out of the Supreme Court of the State, to which they might have been compelled to make return of *all* their proceedings, including the evidence which was before them, that that Court might reverse or affirm their judgment, as was done in the case of The People vs. the Assessors, (55 N. Y. R., 587.)

This not having been done, their judgment is conclusive, not only in favor of *bona fide* holders of the bonds purchased before maturity, but also in favor of *bona fide* (as distinguished from *mala fide*) holders of the bonds whenever purchased. This question was practially decided by the N. Y. Court of Appeals in the case of The People vs. The Assessors (55 N. Y., 587.)

In that case, the objection was taken by the respondents, that the Writ of Certiorari could not be employed, as against the assessors; but the Court decided otherwise —and although that question is not noticed in the opinion, yet the report of the case shows that the objection was made, and it must necessarily have been decided, or the Court could not have reversed and set aside the affidavit of the assessors.

And I submit, that by that decision, the N. Y. Court of Appeals decided that the assessors in ascertaining the number of tax-payers assenting, acted judicially, and when they verified the affidavit, they declared and rendered their judgment *upon that question*.

That the assessors may, and do, act judicially, and that their judgments, when thus acting, are conclusive, has been repeatedly decided by the N. Y. Court of Appeals.

And the question is examined, and the authorites in regard thereto, ably and exhaustively reviewed by Ch. J. Church in his opinion, given for the Court, in the case of the National Bank of Chemung vs. the city of Elmira, (53 N. Y. 49), wherein he says: "The distinction is between an erroneous and an illegal assessment. The former is, when the officers have power to act, but err in the exercise of the power; the latter where they have no power to act at all, and it does not aid them to decide that they have."

Admitting all that is alleged by the counsel for the plaintiff in error, the acts of the supervisor and assessors, certainly come within the first proposition stated by the Chief Judge, and therefore their decision must be treated as final and condusive upon the subject matter within their jurisdiction.

The Supreme Court of New York has never claimed to take, or exercise jurisdiction to restrain public officers from *acting*, by Writ of Certiorari. If any one desires restrain them from *acting* wrongfully, under color of office, or beyond their official authority, resort must be had to a Court of Equity, which acts by injunction, and therein lies the distinction between the Writ of Injunction and the Writ of Ceriorari—the one is to prevent the *doing* of wrong—the other is used to set aside what has already been erroneously *adjudged*.

If any tax-payer of the town doubted the correctness of the judgment of the supervisor and assessors in regard to the number of the assenting tax-payers, or the genuineness of any of their signatures, the Supreme Court was open to him, and he could, by obtaining the Writ of Certiorari, obtain a review of those questions by the Supreme Court, upon the the same evidence as the supervisor and assessors had before them, which

that Court would compel them to make return of to that Court, as was done in the case of The People vs. the Assessors, above cited, as the Writ in that case was issued solely in virtue of the common law power of the New York Supreme Court.

No tax-payer having taken the appropriate means to review the decision and judgment of the assessors, then, cannot assail them now in the name of the town by way of defense in an action to enforce the collection of the bonds brought by a *bona-fide* holder, whether they were purchased by him before or after maturity.

And I therefore insist, that the affidavit which was made and filed by the supervisor and assessors will be considered in all Courts, as conlusive evidence in regard to the sufficiency of the assets.

D. WRIGHT,

Attorney, and of Counsel for Defendant in Error.

20 Ballen. 144=
19 " 91=

CIRCUIT COURT OF THE UNITED STATES,
NORTHERN DISTRICT OF NEW YORK.

THE TOWN OF STERLING, ad's JOHN L. STEWART.	November 5th, 1866. Motion for new trial.

NELSON SITTING AS CIRCUIT JUDGE. We have examined the numerous objections taken to the recovery of the Coupons annexed to the two Bonds in question; and are satisfied that the rulings of the Judge were in conformity to the settled doctrine of the Supreme Court of the U. S., *and not in conflict with any of the cases referred to in the Court of Appeals, in N. Y., but on the contrary that the case is distinguishable from each of them.* The questions involved have been so frequently before us, and will be found in the cases cited in the briefs of the counsel, that we need not more particularly refer to them. New trial denied.

A copy as filed November 6th, 1866.

Signed, N. A. BOYCE, Clerk.

(Seal of the U. S. Circuit Court, for the Northern District of New York.)

COURT OF APPEALS.

COURT OF APPEALS.

THE TOWN OF VENICE, Appl't,
ag'st
CHARLES H. BREED, and others,
Ext'r, etc., Resp't.

Rapello, J :

The referee has found that all of the bonds, which the plaintiff seeks by this action to have delivered up and cancelled, were made and issued without the requisite consent of two-thirds of the tax-payers of the town. That fact, according to the decisions of this Court, rendered the bonds void, even in the hands of *bona fide* holders.

Starin vs. Town of Genoa, 23 N. Y. 439.
People vs. Mead, 24 N. Y. 114.
Same vs. Same, 36 N. Y. 224.

It was further held in those cases, that the burden of proving the requisite consent of the tax-payers rested upon the party seeking to enforce payment of the bonds, and that the affidavit directed by the act under which the bonds purported to be issued, to be filed with the consent, was not evidence of the requisite consent. It is therefore settled by the adjudications of this Court, that no recovery can be had in an action upon these bonds, without affirmative, extrinsic proof of the requisite consent. The fact being found that such consent was

not given, it is clear that a perfect defence to these bonds exists, should an action be brought upon them in any court of this State, either by the present holders of the bonds, or by any person to whom they may be transferred.

Upon this state of facts the question arises, whether an equitable action can be maintained by the town, to restrain the holders of the bonds from suing upon or transferring them, and to compel the surrender or cancellation of the instruments.

The cases in which a Court of Equity exercises its jurisdiction to decree the surrender and cancellation of written instruments are, in general, where the instrument has been obtained by fraud — where a defence exists which would be cognizable only in a Court of Equity; where the instrument is negotiable, and by a transfer the transferee may acquire rights which the present holder does not possess, and where the instrument is a cloud upon the title of the plaintiff to real estate.

Under the Chancery system, where a bill of discovery was necessary to establish the defence, the Court, having acquired jurisdiction of the case for the purpose of discovery, might proceed and award relief; but this ground of jurisdiction no longer exists.

It is true that the jurisdiction of the Court of Chancery has been asserted to decree the surrender of every instrument which ought not to be enforced, whether void at law or not, and whether void from matter appearing on its face or from matter which must be established by extrinsic proof.

Hamilton vs. Cummings, 1 John. Ch. 520, 522, 523.

But Chancellor Kent, in the case cited, in asserting this jurisdiction, recognizes the necessity of showing strong grounds for the exercise of the power, and endeavors to reconcile the apparently conflicting English authorities, by adverting to the general principle, that the exercise of the power is to be regulated by sound discretion, as the circumstances of the individual case may dictate, and that a resort to equity to be sustained must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defences

not arising on its face may be difficult or uncertain at law, or 11
from some other special circumstances peculiar to the case, and rendering a resort to equity highly proper. And it is now well established, that equity will not interpose to decree the cancellation of an instrument, the invalidity of which appears on its face. Story, Eq., §700, *a*.

There must exist some circumstance establishing the necessity of a resort to equity, to prevent an injury which might be 12
irreparable, and which equity alone is competent to avert. If the mere fact that a defence exists to a written instrument were sufficient to authorize an application to a Court of Equity to decree its surrender and cancellation, it is obvious that every controversy in which the claim of either party was evidenced by writing could be drawn to the equity side of the court, and tried in the mode provided for the trial of equitable actions, in- 13
stead of being disposed of in the ordinary manner by a jury. Whether, therefore, the question be regarded as one of jurisdiction, or of practice, it is established by the later decisions that some special grounds for equitable relief must be shown, and that the mere fact that the instrument ought not to be enforced is insufficient, standing alone, to justify a resort to an equitable action.

14

Grand Chute vs. Winegar, 15 Wallace.
Minturn vs. Farmers' Loan and Trust Co., 3 N. Y. 498.
Perine vs. Striker, 7 Paige 598.
Morse vs. Hovey, 9 Paige 197.
Field vs. Holbrook, 6 Duer 597.
Allerton vs. Belden, 49 N. Y. 373.
Reed vs. Bank of Newburgh, 1 Paige 215, 218.

In the present case, in so far as the invalidity of the bonds 15
results from the want of the consent of the tax-payers, there is no ground whatever shown for resorting to an equitable action. Not only is the want of the consent a perfect defence at law, but the onus of proving the consent is upon the party seeking to enforce the bond, and the Court cannot assume that he will be able to establish a fact which does not exist, and of which there is no documentary evidence. If it be said that the town

may, by delay, lose evidences now existing, which would be available to meet and rebut false testimony, one decisive answer is, that the statute now provides a summary mode of perfecting testimony in all cases, and an action is not necessary for that purpose. The case is analogous to those of Field vs. Holbrook, 6 Duer 597, and Allerton vs. Belden, 49 N. Y. 373.

It is urged that the action should be sustained, for the purpose of preventing a transfer of the bonds to a *bona fide* holder. This Court has held that such a transfer would not prejudice the plaintiff, as the defence would be available, even against a *bona fide* holder. 23 N. Y. 439. But it is said that, although such is the rule in this State, a different rule has been adopted in the courts of the United States, and the bonds might be transferred to a *bona fide* holder, who might sue in those courts. There would be force in this argument, provided it were established in the case that the present holders of the bonds were not *bona fide* holders. In that case, it might be proper for a Court of Equity, to prevent their subjecting the town to liability, by a transfer of the bonds. But, if they are themselves *bona fide* holders, there is no justification for interfering with the right of transfer. In contemplation of law, the transferees would acquire no greater rights than are possessed by the present holders.

The real purpose of the litigation seems to be to prevent a resort to the courts of the United States, for the collection of these bonds, and the question is, whether it is the province of a Court of Equity, in a State, to interfere for the purpose of preventing a resort to the Federal Courts for the enforcement of obligations, on the ground that they may be held in those courts to be valid, while, according to the decisions of the State Courts the same obligations are held to be void. I apprehend that the power of a Court of Equity, to decree the surrender and cancellation of instruments, has never before been appealed to, or exercised for such a purpose. Equity will interfere to control the action of parties, and restrain them from transferring negotiable obligations, on the ground that it is against conscience to allow them to create in their transfer a right

or equity which they themselves do not possess. But where 21
the effect of a transfer is not to change in any respect the rights or equities of the parties, I am not prepared to hold that the allegation, that the transferee might resort to a tribunal, in which a rule of decision prevails, or may prevail, differing from that of the court which is asked to enjoin the transfer, is sufficient to justify the interference asked. The wrong sought to be prevented by such a proceeding is not any wrongful act 22
of any party, but a decision of another Court. The facts of the case and the abstract rights of the parties are not changed by the transfer. The greatest effect it can have, is to enable a transferee to sue in a court to which the present holders could not resort. This, in general, would not be regarded as any wrong which a Court of Equity would restrain. If it is a wrong in this case, it must be on the assumption that the 23
Federal Court will render a decision at variance with the decisions of this Court. I am of the opinion that such an apprehension is not a legitimate ground for the action of a Court of Equity, in restraining a transfer, or directing the cancellation of the instrument. There is no finding that the present holders are not *bona fide* holders of the bonds.

As the judgment entered upon the report of the referee was 24
in favor of the defendants, it could not be disturbed, unless facts were found showing that the conclusions of law were erroneous. We have held, over and over again, that the facts showing error in the legal conclusions must be found, and that the appellate court will not search for them in the evidence. In this case, the findings are in favor of the *bona fides* of the defendants. As to five of the bonds, it is found that they were sold and delivered, by the Supervisor and Railroad Commission- 25
ers, to Hutchinson and Murdock, who paid for them par in cash. This finding is not weakened by the further finding, that the money was in the first instance advanced on a pledge of the bonds, which was subsequently converted into a sale. As to the twenty bonds, which were issued direct to the Railroad Company, the referee finds that the holders purchased them, without being informed that they had been delivered directly

to the Company. No fact is found impeaching the *bona fides* of the holders of any of the bonds, and therefore it does not appear that any transfer of them can be made, which will confer upon the transferee any greater equities than are possessed by the present holders.

The fact that twenty of the bonds were delivered directly to the Railroad Company, instead of being sold by the Railroad Commissioners, is relied upon, as a ground for granting relief as to those bonds. In the case of People vs. Mead, 24 N. Y. 124, 125, it seems to be considered that this fact would not constitute a defence, even in the State courts, as against a *bona fide* holder of the bonds. But to entitle the town to affirmative, equitable relief on that ground, it should have been made to appear that the defendants were not *bona fide* holders, which, as has already been shown, the plaintiff has failed to do.

Another ground, urged in support of the claim to equitable relief is, that it is necessary for the purpose of avoiding a multiplicity of suits, and the case of The N. Y. & N. Haven R. R. Co. vs. Schuyler, 17 N. Y. 592, and 34 N. Y. 30, is referred to as an authority in point. But that case was essentially different from the present. There the defendants all claimed shares in the same corporation, which had authority to issue only a limited number.

Shares had been issued in excess of that limit, and some of them must be rejected. The spurious shares were held to be a cloud upon the title of the holders of genuine shares, and the corporation was held to be the proper representative of the genuine stock-holders, to seek the interposition of the court to remove that cloud. Here was a solid ground upon which the plaintiff could found its application for relief. The plaintiff having this standing in court, it was held that all the alleged spurious share-holders were properly joined as defendants. But jurisdiction was not entertained on the sole ground that the holders of spurious shares were numerous. In the present case, there is no question of any cloud upon title.

The plaintiff seeks to have cancelled certain written instruments, purporting to be obligations for the payment of money,

which are held by various independent owners. If it fails to make out a case which would sustain an action for that purpose against any one of them alone, the mere fact that there are several such holders is not of itself sufficient ground for entertaining the suit. If the facts were such as would have sustained the action against one person, had he been the holder of all the bonds, then the case of the N. Haven R. R. Co. would be an authority in favor of the position, that if there were several holders, all might be joined as defendants. But it does not support the position, that the mere fact that numerous independent parties hold separate instruments, upon which they might bring separate suits, is sufficient to justify a court of equity in entertaining an action by the debtor, to compel them to litigate their claims in an action in the forum which he selects.

Under any circumstances, I am inclined to concur with Judge Talcott, in the opinion that a court of equity would not interfere affirmatively to relieve the plaintiff against these bonds, except upon condition that it surrendered what it had received for them. The relief sought is discretionary with the court, and the plaintiff is not entitled to it as matter of absolute right.

Actions of this class are in that respect, governed by the same rules which apply to actions for a specific performance, and relief will never be granted except upon equitable terms, where the case is such as to call for the imposition of terms.—Story, Eq. Jur., §§, 692, 693, 696, and cases cited, § 742. But the reasons before given, I deem sufficient to sustain the conclusion of the referee dismissing the complaint.

There is great doubt whether the defense of the statute of limitations is available in this case. In respect to the limitation of time, it is analogous in principle to an action to remove a cloud upon the title to land, and in such cases I do not understand the rule to be that the statute runs from the time the cloud was first created. See Miner v. Beekman, 50 N. Y., 338 ; Hubbell v. Medburgh, 53 N. Y., 99 ; Arnold v. Hudson River R. R. Co., 55 N. Y., 661.

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Shares had been issued in excess of that limit, and some of them must be rejected. The spurious shares were held to be a cloud upon the title of the holders of genuine shares, and the corporation was held to be the proper representative of the genuine stock-holders, to seek the interposition of the court to remove that cloud. Here was a solid ground upon which the plaintiff could found its application for relief. The plaintiff having this standing in court, it was held that all the alleged spurious share-holders were properly joined as defendants. But jurisdiction was not entertained on the sole ground that the holders of spurious shares were numerous. In the present case, there is no question of any cloud upon title.

The plaintiff seeks to have cancelled certain written instruments, purporting to be obligations for the payment of money,

which are held by various independent owners. If it fails to 31
make out a case which would sustain an action for that purpose against any one of them alone, the mere fact that there are several such holders is not of itself sufficient ground for entertaining the suit. If the facts were such as would have sustained the action against one person, had he been the holder of all the bonds, then the case of the N. Haven R. R. Co. would be an authority in favor of the position, that if there 32
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Judge Talcott, in the opinion that a court of equity would not interfere affirmatively to relieve the plaintiff against these bonds, except upon condition that it surrendered what it had received for them. The relief sought is discretionary with the court, and the plaintiff is not entitled to it as matter of absolute right.

Actions of this class are in that respect, governed by the 34
same rules which apply to actions for a specific performance, and relief will never be granted except upon equitable terms, where the case is such as to call for the imposition of terms.—Story, Eq. Jur., §§, 692, 693, 696, and cases cited, § 742. But the reasons before given, I deem sufficient to sustain the conclusion of the referee dismissing the complaint.

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limitations is available in this case. In respect to the limitation of time, it is analogous in principle to an action to remove a cloud upon the title to land, and in such cases I do not understand the rule to be that the statute runs from the time the cloud was first created. See Miner v. Beekman, 50 N. Y., 338 ; Hubbell v. Medburgh, 53 N. Y., 99 ; Arnold v. Hudson River R. R. Co., 55 N. Y., 661.

On the ground that the facts of the case are insufficient to justify the interposition of a court of equity, to decree the surrender and cancellation of the bonds, or to restrain their transfer, so much of the judgment as is appealed from, should be affirmed, with costs.

"All concur except Church, Ch. J., taking no part."

(A Copy.)

H. E. SICKELS,
Reporter, S. C.

55 N.Y. 587-

Bissell v Savannah 24 How 290
Peoples v Trustees 46 NY 390
Barnitz v Beckwith 35 NY 238
37 NY 371

IN SUPREME COURT OF THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES.

THE TOWN OF VENICE, Plaintiff in Error, vs. JAMES O. WOODRUFF and DANIEL MACAULEY, Defendants in Error.	Brief and Points on the part of the Plaintiff in Error, No. 266. Michael S. Myers and Warren A. Worden, of Auburn, N. Y., of Counsel for Plaintiff in Error. David Wright, Esq., of Auburn, of Counsel for Defendants in Error.

Writ of Error to the Second Circuit, Northern District of New York.

I.

A CONCISE ABSTRACT OR STATEMENT OF THE CAUSE ON THE PART OF THE PLAINTIFF IN ERROR.

This action is brought to recover the amount of principal and interest claimed to be due on certain alleged instruments called bonds, claimed to have been issued by the Town of Venice, as hereinafter stated.

The cause was tried at a Circuit Court held at Canandaigua, in and for the Northern District of New York, on the 17th day of June, 1873, by and before the Hon. Ward Hunt, one of the Associate Justices of this Court. and a verdict ordered for the plaintiff for $10,938.20,

As the briefs filed in the two preceding cases contain a very full abstract and statement of facts in all the causes against the Towns of Venice and Genoa, it is not thought proper to repeat them here.

The leading facts which it is proposed to call the attention of the Court to, in *this brief*, are substantially as follows:

On the 16th of April, 1852, the Legislature of the State of New York passed an act (chapter 375, Laws of 1852, see Appendix to the points and briefs in the two preceding cases, Schedule A, where the act in question is set out in full,) by the first section of which it was provided that it should be lawful for the Supervisor of any town in the County of Cayuga, and the Assessor of said town (who were appointed commissioners to act with the Supervisors in effecting the purposes of the act) *to borrow*, on the faith and credit of such town, such sum of money as they might deem necessary, not exceeding $25,000 — for a term not exceeding twenty years, on interest not exceeding seven per cent., and to execute therefor, under their official signatures, a bond or bonds, with interest and principal of such loan, payable at such times and place as should be agreed upon and in the bonds to be executed under the authority of the act. All the money borrowed under the act was to be paid over to the president and directors of such railroad company, then or thereafter to be organized under the general railroad law, as might be expressed by the written assent of two thirds of the resident tax-payers of the town, to be expended by such railroad company in grading, constructing and maintaining a railroad or railroads passing through the city of Auburn, and connecting Lake Ontario with the Susquehannah and Cayuga Railroad, or the New York and Erie Railroad, *provided* that the Supervisor and Commissioners *should have no power to do any of the acts* authorized by the said act, *until* a railroad company had been duly organized according to the requirements of the general railroad law, for the purpose of constructing the described railroad, *and the written assent of two-thirds of the resident persons taxed in said town as appearing on the assessment roll of such town made next previous to the time such money should be borrowed, shall have been obtained* by such Supervisor

and Commissioners, or some one or more of them, and filed in the Clerk's office of Cayuga County, *together with the affidavit of such Supervisor or Commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents were thereto attached and filed comprised two-thirds of all the resident tax-payers of said town on its assessment roll next previous thereto.*

It was provided by the second section of the act, that it should be lawful for the Supervisor and Commissioners, on obtaining and filing the assents, as provided in the first section, to subscribe for and take, in the name of and for such town, such a number of the shares of the capital stock of such railroad company as should be equal to the amount of bonds executed under the authority of the act; or, in lieu of borrowing money and issuing bonds, with the assent of two thirds of the tax-payers, a tax might be levied to pay for the amount of stock subscribed.

The succeeding section of the act contains various provisions in respect to raising money to pay principal and interest of the bonds, the application of dividends and profits of the stock, and for its sale, &c., &c., which are not material to the principal question intended to be discussed in this brief.

Inasmuch as the act in question is set out in full and attached to the briefs filed in the two preceding causes, it is not attached to these points and briefs. A third repetition of it would be cumbersome rather than useful.

The principal objection intended to be raised in this brief to a recovery by the plaintiff, and which was, among others, presented on the trial, was that the bonds had been issued without authority, inasmuch as, in fact, *no money had been borrowed upon the credit of the town, and that the assent of two-thirds of the resident tax-payers of the town had not been obtained, as required by the act.*

The plaintiffs rested their case so far as regards the regularity and "*power*" to issue the bonds, upon the consent filed in the

Clerk's office, with the affidavit, such as it was, of the Supervisor and Commissioners attached, stating that the subscribers composed two-thirds of the resident tax-payers of the town appearing on the last preceding assessment roll.

The defendant then offered to prove, among other things, that no money was ever borrowed or agreed to be borrowed on the credit of the town, for the purposes contemplated by the act, but, on the contrary thereof, said alleged bonds were in the first instance delivered to the railroad company for stock, (see Record, page 32,) and that *two-thirds of the resident tax-payers of the town had never given their assent, as required by the act.* See Record, page 33.

On the proof thus offered, as stated in the Record (page 34), the Court ordered the jury to find, and they did find a verdict for the plaintiff for ten thousand nine hundred and thirty-eight dollars and twenty cents, and to which ruling and decision the counsel for the defendant below excepted, and the same was then and there noted.

The counsel for the defendant then asked the Court to rule and decide that on the above proof, the plaintiffs below were not entitled to recover. But his Honor, the Judge, decided otherwise, and the plaintiff in error excepted. See Record, page 32.

Assignment of Errors.

The errors assigned in the Record are the same as those assigned in all four of the causes against the towns of Venice and Genoa (none of which are intended to be waived), but as they are stated in full in the briefs and points filed in the two preceding causes, and as a repetition of them might seem to the Court to be a useless tautology, they are therefore not repeated here. They will be found in the Record, commencing at page 27, and ending at page 34 of the Record. The pleadings in all these causes are under the New York code, and the general denial interposed by the defendant below in all the cases, puts in issue every material averment necessary to be proved by the plaintiffs below.

POINTS FOR APPELLANT.

I.

In order to give any validity to the instruments upon which the suit is brought, it is essential that it be made to appear that the town officers, by whom they were executed and issued, had *power and jurisdiction* to execute them, and acted in accordance with the authority conferred by the statute; and hence, that before they undertook to issue them, they had obtained the consent of two-thirds of the taxpayers of the town to the borrowing of money provided for in the act.

1. The conditions upon which the Supervisor and Assessors were authorized to exercise the powers conferred by the statute, were:

1st, The formation of a railroad company under the general act, for the purpose of constructing a railroad, passing through the city of Auburn, and connecting Lake Ontario with the Susquehanna and Cayuga Railroad, or the New York and Erie Railroad.

2d, The written consent of two-thirds of the resident persons taxed in such towns appearing on the assessment roll of the town next previous to the time of borrowing the money authorized, and filing the same in the Clerk's office of Cayuga County, with the affidavit of the Supervisor and Assessors, or any two of them, attached, to the effect that the persons whose written assents are thereto attached *and filed*, com-

prise two-thirds of all the resident tax-payers of said town on its assessment roll, next previous thereto.

Laws of 1852, Chap 375, § 1, aforesaid.

2. It was proved on the trial that a paper or papers, purporting to be the assents of sundry of the tax-payers of the Town of Venice, with an affidavit, such as it was, attached, that the several persons whose written assents were attached, composed two-thirds of all the resident tax-payers of Venice on its assessment roll, made and completed next previous to the date of the affidavit, which was sworn to on the 30th of September, 1852, and filed on the third day of November, 1852. See Record, page 28.

3. There was no proof that the signatures were genuine; or that the persons assenting comprised two-thirds of the resident tax-payers, other than by that affidavit; and the defendant (below) offered to prove that several of the signatures were not genuine, and that others were duplicates, and that in point of fact, two-thirds of the resident tax-payers did not give their assent, as required by the act, which the Court refused to allow, (see Record, page 33); and hence, on this argument, the case is to be disposed of, upon the assumption that, *in fact*, the assent of two-thirds of the tax-payers had never been obtained or filed.

4. It is not pretended that *in fact* the town officers ever borrowed any money on the faith and credit of the town, but, on the contrary thereof, so far as this argument is concerned, it must be taken as true, that the alleged bonds were, in the first instance, delivered to the railroad company for stock. See Record, page 32.

5. It must also be taken as true, for the purposes of this argument, that Benjamin Gould, Esq., of Cayuga County, was the owner of the bonds now in suit, until some time on or about the first day of Septem-

ber, 1867, when he disposed of the same, but not to these plaintiffs.

It is worthy of note right here, that these plaintiffs have recovered as interest, for one or two years on coupons which became due while Mr. Gould owned them. The cause was tried in June, 1873 — less than six years after Mr. Gould, by the offer, had parted with the bonds. Were not such bonds and such interest coupons dishonored, when taken in connection with the other proof offered? See Record, page 32.

II.

The bonds in question were signed and delivered by the town officers without authority, and in violation of the statute, and are not binding on the town.

1. In order to bind the town and give the bonds any legal validity whatever, it was necessary that the power and authority given by the statute should have been strictly pursued by the town officers, and *the conditions precedent* to the exercise of power should all have been performed.

2. The first essential requisite to the performance of any valid act by the town officers, was obtaining the written assent of two-thirds of the resident taxpayers, and this they never obtained, and hence they had no authority to borrow money or execute any bonds, for the payment of which the town could be made liable. If they could, then the prohibition in the statute is idle and unmeaning. A bond made in violation of the statute is of no more force than one made without any authority whatever.

3. The town officers had no right to borrow money on the credit of the town, and in fact they did not attempt to borrow any, and none was borrowed. Even if two-thirds of the tax-payers assented, they had no right, according to the statute, to give bonds on behalf of the town, except for money borrowed. There was no power given, by which they could properly issue and negotiate the bonds of the town for any purpose or consideration, except for money borrowed. Subscribing for stock in a railroad company, and giving bonds in exchange for certificates, is not in any possible sense borrowing money, and such a transaction is not within the statute.

III.

The fact that a written assent of a certain number of tax-payers, with an affidavit that they composed two-thirds of the tax-payers of the town, was filed, is of no force to give the bonds validity, when it appears that, in fact, two thirds did not assent, according to the act.

1. Because, if two-thirds of the tax-payers did not assent, the town officers never became the agents of the town, for the purpose of borrowing money or issuing bonds, and if they never acquired the position of agents of the town, they could give no bonds in its behalf, which could be valid for any purpose.

2. It is therefore unlike that class of cases where an agent, having special authority to do an act for his principal, *apparently* pursues it, but in fact violates his duty. These cases proceed on the assumption that the relation of principal and agent exists. Here, without the requisite assent, no such relation existed; and the assent, in fact, was not only necessary to prove the relation, but to give them "*any power*" to

borrow money or execute bonds, or to do any act whatsoever.

16 New York Rep., 129, 30, 32, 35.
The North River Bank v. Aymar, 3 Hill, 262.

3. There is not any case where, upon the doctrine of agency, one person is made liable for the acts of another, except in the first instance, the authority of the agent, to a certain extent, is established; and here, to make out any agency, the assent required by the act was necessary to be affirmatively made out.

4. If the town officers had proceeded to issue bonds, without having obtained the assent of a single taxpayer, no one would pretend that the bonds were valid; and, so far as the statute is concerned, any less number than two-thirds is just as ineffectual as if none assented. If the assents and affidavit filed had been forged, that might be shown, and the proof would be ineffectual; and the proof offered in this case was equally effectual to show the total want of power to borrow money or issue bonds. It is submitted, therefore, that the bonds were void, as against the town of Venice.

IV.

The bonds having been issued in violation of the statute and without authority, no recovery can be had upon them against the town.

1. Negotiability has nothing to do with the power to make. If made without power, they are like *forged*, or other illegal and void paper — void in the hands of every person, and under every circumstance whatsoever.

2. Moreover, any person proposing to deal in securities of this character was bound to take notice of the terms of the statute, and was also bound to see that the authority given to the officers of the town had been strictly pursued. He purchased at his peril.

13 New York R., 612—Mechanics Bank vs. New York and New Haven R. R. Co.
16 New York R., 146, et seq; Comstock, J.

3. At all events, he was bound to satisfy himself that the town officers had so far observed the statute that, by virtue of its provisions, they were vested with power to act as agents of the town in borrowing money and issuing bonds; and, to be satisfied of that, it must have appeared that two-thirds of the tax-payers had assented.

4. On this question of the extent of the agents' power, or whether they had any power, the mere *appearance* will not suffice. The *fact* of due authority to act must exist; and the party proposing to deal with such securities must be satisfied as to the fact, or act at his peril.

5. It will be perceived that the above question has been discussed the same as though it had not been passed upon by the highest court in the State of New York. It is hoped and believed, however, that the decision of the highest court of the State will be considered as decisive of the question.

23 New York Reports 439, Starin vs. The Town of Genoa, Gould vs. The Town of Sterling.

1 New York Supreme C. R., 130, by Isaac Grant Thompson and R. D. Cook, The Town of Venice vs. Breed. This Court has not passed on the validity of any instruments issued under the statute in question. What is there said by Mr. Justice Mullin has reference to the rulings now under review, and *not to decisions in this Court.*

V.

Without waiving the consideration of the various other questions arising in the case, it is submitted that the judgment below should be reversed, and a new trial granted.

M. S. MYERS, AND
WARREN A. WORDEN,
of Counsel for Plaintiff in Error.

Auburn, N. Y., January, 1875.

SUPREME COURT OF THE UNITED STATES.

THE TOWN OF VENICE, PLAINTIFF IN ERROR.

vs.

JAMES O. WOODRUFF and DANIEL MACAULEY, DEFENDANTS IN ERROR.

No. 55.

ARGUMENT FOR DEFENDANTS IN ERROR.

D. WRIGHT, Att'y,
And of Counsel for Defendants in Error.

JUPREME COURT OF THE UNITED STATES.

THE TOWN OF VENICE, Plaintiff in Error.
vs.
JAMES O. WOODRUFF, & DANIEL MACAULEY, Defendants in Error

No. 55.

BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR.

The pleadings in this case are the same as in the case of Venice vs. Murdock (No 53) except that in this case, the complaint alleges that the bonds were purchased by the defendants in error, to wit: "on the first day of January 1857," and in this respect this case is the same as is the case of Venice vs. The same Defendants in Error (No. 54.)

The proofs on the part of the plaintiffs below, were the same, and the objections thereto and exceptions were the same.

The offers of proof on behalf of the defendants below, were the same, except that the ownership of the bonds, was in Benjamin Gould, Esq., of Cayuga County, instead of Slocum Howland as alleged in the other case (No. 53.)

In regard to these differences I would refer to my brief filed in the case of The Town of Genoa vs. Woodruff and Macauley (No. 54.)

In other respects the facts in this case and the offers and exceptions therein, are substantially the the same as in the case of Venice vs. Murdock (No. 53) and I submit this case upon my brief filed in that case.

Auburn, N. Y., September, 1875.

D. WRIGHT, Att'y,
and of Counsel for Deft's in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES, No. 267.

THE TOWN OF VENICE, Plaintiff in Error, vs. WILLIAM L. MATSON, Defendant in Error.	Warren T. Worden and Warren A. Worden, of Auburn, N. Y., of Counsel for Plaintiff in Error. David Wright, Esq., of Auburn, N.Y., of Counsel for Defendant in Error.

Writ of Error to the Second Circuit, Northern District of New York.

A CONCISE ABSTRACT OR STATEMENT OF THE CASE, ON THE PART OF THE PLAINTIFF IN ERROR.

This cause was tried at a Circuit Court, held at Canandaigua, in and for the Northern District of New York, on the 17th day of June, 1873, by and before the Hon. Ward Hunt, one of the Associate Justices of this Court.

It was tried under like circumstances as case No. 264, The Town of Venice, Plaintiff in Error, vs. Evander Murdock, Defendant in Error.

The two cases are alike in every essential particular, except that the verdict in this case is for the sum of three thousand one hundred and twenty-five dollars and twenty cents.

The exceptions are substantially the same, and present the same questions as in the case of The Town of Venice, Plaintiff in Error, vs. Evander Murdock, Defendant in Error. The

exceptions or assignments of errors commence at folio 24, on page 13 of the Record, and end at page 18.

The complaint or declaration contains the same averment, as to the transfer of the bonds, with coupons attached, &c., as in the Murdock Case. See Record, page 3, at the bottom, and top of page 4.

It is believed that, as the decision in the case of Murdock will control this case, as well as all the others, and as the brief, filed in that case, contains a full abstract and statement of the case, and an assignment of all the alleged errors, no further abstract or statement of the case, or assignments of errors, is necessary, or will be required on the part of the Plaintiff in Error.

Auburn, N. Y., Dec., 1874.

WARREN T. WORDEN and
WARREN A. WORDEN,
Attorneys and of Counsel
for the Town of Venice,
Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

THE TOWN OF VENICE, PLAINTIFF IN ERROR.

vs.

WILLIAM L. MATSON, DEFENDANT IN ERROR.

No. 56.

ARGUMENT FOR DEFENDANT IN ERROR.

D. WRIGHT, Att'y,
And of Counsel for Defendant in Error.

SUPUEME COURT OF THE UNITED STATES.

THE TOWN OF VENICE, Plaintiff in Error.
vs.
WILLIAM L. MATSON, Defendant in Error.

No. 56.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

The pleadings in this case are substantially, and I believe identically, the same as in the case of Venice vs. Woodruff and Macauley. (No 55.)

The proofs were the same, the offers and exceptions were the same, and I therefore submit this case upon my brief filed in that case and in the case of Venice vs. Murdock. (No 53.)

Auburn, Sepetember 1875.

D. WRIGHT, Att'y,
and of Counsel for Def't in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES, No. 310.

THE TOWN OF VENICE, Plaintiff in Error, vs. OPHER EDSON, Defendant in Error.	Warren T. Worden and Warren A. Worden, of Auburn, N. Y., of Counsel for Plaintiff in Error. David Wright, Esq., of Auburn, N.Y., of Counsel for Defendant in Error.

Writ of Error to the Second Circuit, Northern District of New York.

A CONCISE ABSTRACT OR STATEMENT OF THE CASE, ON THE PART OF THE PLAINTIFF IN ERROR.

This cause was tried at a Circuit Court, held at Utica, in and for the Northern District of New York, on the 18th day of March, 1873, by and before the Hon. Lewis B. Woodruff, Circuit Judge for said District.

It was tried substantially under like circumstances as case No. 264, The Town of Venice, Plaintiff in Error, vs. Evander Murdock, Defendant in Error.

The two cases are alike in every essential particular, except that the verdict in this case is for three thousand four hundred and forty-three dollars and fifty-six cents.

The exceptions are substantially the same, and present the same questions as in the case of The Town of Venice, Plaintiff in Error, vs. Evander Murdock, Defendant in Error. The

exceptions or assignments of errors commence at folio 40, on page 18 of the Record, and end at page 21.

The complaint or declaration contains the same averment, as to the transfer of the bonds, with coupons attached, &c., as in the Murdock Case, the time alleged being the first day of January, 1855. See Record, page 4, middle of the page.

It is believed that, as the decision in the case of Murdock will control this case, as well as all the others, and as the brief, filed in that case, contains a full abstract and statement of the case, and an assignment of all the alleged errors, no further abstract or statement of the case, or assignment of errors, is necessary, or will be required on the part of the Plaintiff in Error.

Auburn, N. Y., Dec., 1874.

WARREN T. WORDEN and
WARREN A. WORDEN,
Attorneys and of Counsel
for the Town of Venice,
Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

THE TOWN OF VENICE, Plaintiff in Error,
vs.
OPHER EDSON, Defendant in Error.

NO. 90.

Brief for Defendant in Error.

D. WRIGHT,
Attorney, and of Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

THE TOWN OF VENICE, PLAINTIFF IN ERROR,
vs.
OPHER EDSON, DEFENDANT IN ERROR.

No. 90.

Brief on behalf of the Defendant in Error.

THE FACTS.

This action was brought to recover the Principal and Interest due upon two of the bonds, (No's 10 and 23) issued by the Town of Venice to aid The Lake Ontario, Auburn and New York R. R. Co., under the provisions of the act passed by the Legislature of the State of New York, April 16, 1852, chapter 375, of the laws of that year. The Plaintiff below, recovered for Principal and Interest $3,572.12, and for cost $51.45, making in the aggregate $3,623.57.

Although the pleadings differ from those in the case of Venice vs. Murdock, in several particulars, having been drawn according to the common law practice, and not according to the New York code of procedure, yet the issues are substantially the same as those in the case of Murdock vs. the Town of Venice, (No. 53).

The cause was tried at the Utica Circuit in March, 1873, before the Hon. Lewis B. Woodruff and a Jury, and resulted in a verdict for the Plaintiff below, upon which judgment was entered as hereinbefore stated.

The proofs on the part of the Plaintiff below were the same, substantially, and I believe identically as in the case of Murdock vs. the same Town, (No. 53.)

The Defendant below then undertook to prove that the assents of the tax-payers did not contain the names of two-thirds of the resident tax-payers of the town, and produced from the office of the Treasurer of Cayuga County, a book, which was claimed to be the assessment roll of the Town for the year 1852, and offered to show that the names upon the assents did not comprize two-thirds of the names of the resident persons taxed as appeared on said alleged assessment roll. To this, Counsel for Plaintiff below objected, because said book was not proved to be, and was not in fact, the assessment roll of the town; that the same was neither signed nor certified to by the assessors of said town, and did not contain the affidavit of the assessors as required by the Statutes of the State of New York. The objection was sustained and the book was excluded, (Record p. 19).

The Defendant below then proved that the bonds were delivered to the R. R. Co. for stock, at par, and that the town obtained Scrip for the stock, and that Benjamin Gould became the owner and holder of the bonds in 1854, and continued such owner until September, 1867, (Record p. 19, 20) The Counsel for the Plaintiff then read the assents and affidavit, (Record p. 20, 21). To which Counsel for defendant below excepted. It was then proved on the part of the Defendant below that some of the names upon the assents were not the genuine signatures of the witnesses who bore the same name, (Record p. 21). But there was no evidence given tending to prove that the genuine signatures did not include two-thirds of the resident tax-payers upon the assessment roll of 1852, as no such roll was produced upon the trial.

FIRST.

The first question which I shall attempt to solve, is, was the plaintiff the bona-fide purchaser for value, of the bonds in controversy, and before maturity—and if not, had he the title of a bona-fide purchaser before maturity. The facts in regard to the two bonds in controversy in this suit, as proved upon the trial, are as follows:

These bonds were delivered to the R. R. Co. at par in payment for stock, on or about the 11th of October, 1853, and scrip therefor was received by the town, (Record p. 19).

Benjamin Gould became the owner of the bonds some time in 1854, and continued to own and hold the same until on or about the 1st of Sept. 1868, (Record p. 19, 20).

They were produced upon the trial by the Plaintiff without any other proof of ownership.

Mr. Gould disposed of them in 1867, they were payable January 1st, 1873.

I submit the presumption of law is, in the absence of all proofs to the contrary, that the party who produces negotiable paper upon the trial, purchased the same bona-fide and before maturity.

The only argument against this presumption is, that there were overdue Coupons annexed to the bonds, when the same were purchased by the Plaintiff. In regard to that question, reference is made to the *First Point*, in the brief filed in the case of the Town of Venice vs. Evander Murdock, (No. 53). There is no allegation or proof whatever that there were any over-due coupons remaining unpaid in 1854, when Mr. Gould became the owner and holder of these two bonds. The presumption is the contrary, inasmuch as the first coupon remaining attached to the bonds when produced upon the trial, was that which fell due July 1, 1856.

SECOND.

But assuming that the bonds were delivered in the first instance directly to the R. R. Co. at par for stock, and that the Defendant in Error is not entitled to be treated as the owner of negotiable paper purchased by him before maturity, yet I insist that the town has no defense.

For argument upon this point I refer to the *Second Point* of my printed brief, filed in the case of the Town of Venice vs. Murdock, (No. 53).

THIRD.

The Plaintiff cannot be affected by the fact that these two bonds were, in the first instance, delivered directly to the R. R. Co. at par, in payment for stock. The Town is equally estopped from availing itself of any such proof irrespective of the question whether the Defendant in Error purchased the bonds before or after maturity. All that is said by way of argument in the *Third* and *Fifth Points* of my printed brief, filed in the case of The Town of Venice vs. Murdock, (No. 53), is applicable to this point, except that the name of Benjamin Gould should be substituted for that of Slocum Howland, and in addition to the authorities cited in my printed brief in that case, see

Holbrook vs. N. J. Zinc Co., 57 N. Y. 616.

FOURTH.

The *Fourth Point* of my printed brief, filed in the case of The Town of Venice vs. Murdock, (No. 53) does not arise in this case. Because upon the trial the town attempted to prove that the number of assents were insufficient, but failed to produce the assessment roll of 1852, and hence if the recitals in the bonds, together with the affidavit of the assessors, were but prima facie evidence of that fact, it was sufficient. That the decision of the Court upon the trial, rejecting the book produced as the assessment roll was correct, see

VanRensselaer vs. Witbeck, 7 N. Y. 517.
Westfall vs. Preston, 49 N. Y. 349.

FIFTH.

The question of Estoppel of the Principal by the declaration of the Agent, is applied independent of the commercial law, and a purchaser of the bonds, whether purchased before or after maturity, may, as against the town, confidently rely upon the recitals therein, against any proof by the Town that the bonds were not delivered in the first instance for money borrowed.

The *Sixth*, *Seventh*, *Eight*, *Ninth*, *Tenth*, and the *Last* Points in my printed brief filed in the case of The Town of Venice vs. Murdock, (No. 53) are applicable to this case.

Auburn, N. Y., Oct., 1875. D. WRIGHT,
Att'y for Deft. in Error.